THE
PRACTICE OF THE LAW
IN
ALL ITS DEPARTMENTS;
WITH A VIEW OF
RIGHTS, INJURIES, AND REMEDIES,
AS AMELIORATED BY RECENT STATUTES, RULES, AND DECISIONS;

SHEWING

THE BEST MODES OF CREATING, PERFECTING, SECURING, AND TRANSFERRING RIGHTS;

AND

THE BEST REMEDIES FOR EVERY INJURY, AS WELL BY ACTS OF PARTIES THEMSELVES,
AS BY LEGAL PROCEEDINGS; AND EITHER TO PREVENT OR REMOVE INJURIES;
OR TO ENFORCE SPECIFIC RELIEF, PERFORMANCE, OR COMPENSATION:

AND

THE PRACTICE

ARBITRATIONS; BEFORE JUSTICES; IN COURTS OF COMMON LAW;
EQUITY, ECCLESIASTICAL AND SPIRITUAL; ADMIRALTY;
OF PRIZE; COURT OF BANKRUPTCY; AND COURTS OF
ERROR AND APPEAL.

WITH NEW PRACTICAL FORMS.

INTENDED AS

A COURT AND CIRCUIT COMPANION.

IN THREE VOLUMES.

VOL. III.—PART VI.

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TO THIS

SIXTH CONCLUDING PART.

THE following pages complete my undertaking. The Table of Contents preceding each part show the analytical arrangement, *embracing every subject essential to be familiarly known to Students and Practitioners;* and the *general Index* concluding this part will render every point readily accessible. When it is considered that the recent alterations in the law have affected almost every branch, it will be admitted that so extensive a range has demanded no inconsiderable labour and consideration, and I hope it will be found that they have been bestowed with care. The *fifth* and *sixth* parts relate more particularly to *the practical mode of conducting an Action and Defence, and other practical proceedings in the Superior Courts,* at least until after verdict, and which parts of a suit have required most particular consideration; and here I have endeavoured to introduce numerous suggested improvements that must place the *Client* on the vantage ground, and relieve the *Practitioner* from the risk of liability or censure, and certainly redound to the honour of the Profession. In other words, I have attempted to intersperse a system of *Legal Ethics,* which, if adopted in practice, will inevitably advance the best interests as well of clients as of practitioners.

The seventeenth Chapter relative to *Irregularities, Affidavits, Summons, Judge's Orders, Motions and Rules,* and the twenty-sixth, twenty-seventh, twenty-eighth, and twenty-ninth Chapters relating to *Evidence and*

Witnesses, Preparing for Trial, Briefs and Trials, are it is believed, *new,* and will, I trust, be found of considerable utility in enabling Practitioners to try a cause with more security of success. (*a*)

In concluding this work, I cannot refrain from thanking my professional friends for their kind and flattering reception of the preceding Parts, a reception of a *law* work; indeed, so unprecedented, that although I have certainly anxiously exerted myself to introduce the best results of forty years' study and practice, yet I cannot but think is to be attributed in no small degree to that *friendly feeling* and *Esprit de Corps,* which I am proud to say are pre-eminent amongst the members of the Legal Profession. Indeed, the kindness of my Professional friends has cheered me when I might otherwise have been borne down by no common affliction, cutting me off from a more active and ambitious career, and confining me to the laborious and monotonous pursuit of Chamber Practice.

J. C.

Chambers, 6, Chancery Lane,
October 20, 1835.

(*a*) It may be objected that, instead of concluding with the trial and verdict in an action, I ought to have written on the subjects of New Trials, Judgments, Executions, Writs of Error, Proceedings against Bail, &c. I have not done so, because the alterations on those parts of practice are not numerous, and the subjects have already been elaborately considered by Mr. Tidd in his work, and in other Treatises, and I have been unwilling to increase the bulk or expense of this work, at least, until I know the wishes of my Professional Friends.

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Division of the subjects of this part.

The proceedings in an action after the defendant's appearance to serviceable process, or bail above have been put in and perfected to bailable process, may be arranged under four *principal heads*, viz.

I. The *ordinary regular proceedings* in a contested action.

II. *Occasional proceedings* in an action; and under which division may also be arranged the occasional proceedings without any pending action.

III. *Proceedings attributable* to some *informality* or *substantial defect* in the *pleadings* or *judicial* proceedings, or to some *irregularity* in the *practical* proceedings, or in the conduct of the ordinary or occasional proceedings.

IV. The *modes* of *proceeding*, whether on the part of the plaintiff or defendant, in either of those three cases.

I. Enumeration of the ordinary regular proceedings.

I. The *usual regular proceedings* in an action relate to the *pleadings*, whether declaration, plea, replication, rejoinder, surrejoinder, rebutter, or surrebutter, and to the *issue* joined upon an affirmative on one side, and negative on the other; or to the *delivery* of the *issue* and *notice of trial;* or the making up and passing the *record of nisi prius;* or the causing the *jury process* to be issued and executed, so as duly to convene *the jury* before the *judge*, (or now sometimes the *sheriff*,) appointed to try causes at nisi prius in London or Middlesex, or

(a) N. B. The last part concluded with page 408. It has been deemed advisable in commencing this part, to leave a space between that page and this chapter, for the introduction hereafter of any enactments and decisions relative to the proposed alterations in the law of arrest, and which, when enacted, will be supplied to the purchasers of this part.

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on the circuit, (or if the debt do not exceed £20, the writ of trial before the under-sheriff or local judge); or to the subpœnaing *witnesses*, or examining them on interrogatories, if they be going abroad or actually abroad, and adducing the *evidence*; or to preparing and delivering the *briefs* to counsel, *consultation* with them thereon, and *conduct pending the trial*, to the *verdict*, taxing the *costs*, and signing the *judgment*; and lastly the *execution*.

Between each of these there frequently are numerous regular but less important steps, principally of a practical nature, to compel the opponent to proceed; as, on the part of the *defendant*, a rule peremptorily requiring the plaintiff to declare by a certain time, and a demand of declaration before a judgment of non-pros can be signed; and on the part of the *plaintiff*, a *notice* to plead, *rule* to plead, and *demand* of plea; and again on the part of the defendant, a demand of replication, or a motion for judgment as in case of a nonsuit, to compel the plaintiff to try, or a trial by proviso, where the defendant himself takes down the record for trial.

Of the different warnings on each side in the course of an action.

We have seen that in the case of process, a defendant is bound, without any *further notice* than that given by the process itself, to enter his appearance, or put in bail above, within the limited time; but in the *subsequent stages* of an action, it appears to have been in general considered just, that two, or even three, additional warnings or notices should be given before either party shall be allowed to take an adverse measure in consequence of his opponent's neglect.(*a*) Thus formerly, although a plaintiff was bound to declare before the expiration of a certain time after the return of process, unless he had by leave of the Court or a judge obtained further time, yet a defendant could not sign judgment of non-pros until he had *ruled the plaintiff to declare;* and in the Courts of Common Pleas and Exchequer he must also have *demanded* a declaration four days before he could sign such judgment. So although a defendant was bound to plead within a certain time after he had notice of the plaintiff's declaration, yet the plaintiff could not sign judgment by default for want of a plea, without first giving the defendant *a notice to plead*, and also *ruling* him to plead, and further

(*a*) And yet if inadvertently a special plea, though in fact settled by counsel, be not signed by him when requisite, and be delivered without such signature, the plaintiff, although he knows the defendant has a just defence on the merits, may treat it as a nullity, and without any intimation or notice may sign judgment as for want of a plea, and issue execution in an action of debt. A practice which unquestionably demands alteration. See *post* as to irregularity.

demanding a plea twenty-four hours before signing judgment. These and numerous other, perhaps redundant, warnings, certainly considerably increase the expense of an action, and not unfrequently, instead of being received, as originally intended, friendly and liberal warnings, or intimations of the necessity for the party to whom they are given taking some step in the cause, are, on account of some trifling deviation from the established practice, treated as irregular, and made the subject of vexatious and expensive motions also occasioning delay; and, therefore, the recent *rules* have dispensed with *some* of such superabundant warnings, as in the instance of the rule to declare, and the rule to reply,* &c. which are no longer necessary; but still there are too many useless proceedings, which, if abolished, would not only lessen the costs of an action, but also diminish the risk of irregularity incident to every step; and if a defendant, on the service of a writ, is to be bound without further caution to enter his appearance in eight days, it may be inquired, why should he not be equally bound to plead at a specified time, without expecting also a *notice* to plead, a *rule* to plead, and a *demand* of plea?

II. Enumeration of the occasional proceedings.

II. The *occasional* proceedings are very numerous, and may be subdivided under several heads; as *first*, before any defence is made, a summons or motion *to stay the proceedings* until the plaintiff, who is abroad, or is in insolvent circumstances, has given security to pay costs; or to stay proceedings on the ground that another action is depending for the same subject-matter, or because the action is frivolous, as for too small a debt, or is vexatious, or contrary to good faith. Under this head also may be arranged applications under the interpleader act, 1 & 2 W. 4, c. 58, in cases of actions or proceedings against a sheriff, or a stakeholder, or party who claims no interest in the subject-matter, but only seeks to be indemnified, and to compel the real claimants to contest the matter inter se, and not at his expense. Various other applications either of a general or of a particular nature, and founded either on the common law or on a particular statute, as under the annuity act, or mortgage act, or landlords' act, &c. may also here be classed. Applications to consolidate several actions that may properly be joined, are also of this description.

Secondly, are applications preparatory to a defence; as for particulars of demand, demand of oyer, or inspection of public or private documents, &c.

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Thirdly, are the *occasional proceedings where there is no defence*, or only a partial defence; as first, when the defendant, to prevent an increase of costs, proposes, and the plaintiff accepts, a *cognovit* or a *warrant* of *attorney*, either before or after plea, and agrees to *withdraw* such plea or enter a retraxit, as it is technically termed, or proposes and the plaintiff assents to compound a penal action, if the Court will give leave; or where a defendant, having no defence, suffers *judgment* by default, upon which there is in an action of debt an immediate final judgment and execution, and in other actions either a *writ of inquiry*, and an inquisition or verdict thereon, judgment and execution; or in cases of bills of exchange, promissory notes, checks, or actions for rent or mortgage money in arrear, a *reference to the master* to compute the principal money and interest remaining due.

Proceedings, where there is only a *partial defence* to the action, are, when it is expedient to *pay money into Court*, either of right at common law, or under the 3 & 4 W. 4, c. 42, sect. 21, even in actions for torts to personal or real property, by leave of the Court or a judge; or to apply to stay the proceedings on restoring to the plaintiff the chattels, or a part, in an action of detinue or trover.

Pleas of matter of defence, arising *pending the suit*, before the late rules putting an end to the entry of continuances, termed pleas *puis darrien continuance*, though they may be of matter before or after issue joined, may also here be classed.

Special cases, either stated by consent after issue joined under the 3 & 4 W. 4, c. 42, to save the costs of a trial when there are no disputed facts, or stated on or after the trial at common law by the direction or recommendation of the judge or Court, in order to settle a question of law arising upon admitted facts, may also be classed amongst the occasional proceedings.

Special verdicts also are occasionally given, and obviously fall under the same arrangement; and in each of these the Court in banc hear arguments and decide deliberately what judgment shall be given.

Applications by a plaintiff for leave to *discontinue*, or his voluntary entry of a *nolle prosequi*, or submitting to a *non-pros*, judgment as in case of a nonsuit, or a *nonsuit*, are also occasional proceedings when a plaintiff, in the course of his action, discovers that it is not sustainable either in part or the whole, and submits to one of these modes of determining the same.

The instance of a judge *discharging* a jury who cannot come

to a decision, or of the parties consenting to *withdraw a juror*, may also be arranged under this head of *occasional* proceedings.

III. Enumeration of the defective or irregular proceedings, whether in pleadings or practice, and modes of objecting.

III. The *third principal division* relates to *incorrect pleadings*, or *irregular practical proceedings*, arising pending a suit, and to the *modes of objecting* to the same.

The first of these are defects in the *pleadings*, and which are to be taken advantage of by *demurrer*. These may arise in any stage of pleading, as in the declaration, plea, replication, rejoinder, surrejoinder, rebutter, surrebutter, or plea pending the action, formerly called puis darrien continuance, in respect of some *informality* or *substantial defect*, either in stating the plaintiff's cause of action, or the defendant's ground of defence, and which, if the objection be a mere technical defect, must, under the statute 4 Ann, c. 16, be stated or assigned *particularly* as cause of *special* demurrer; and according to the recent rule of Court, Hil. T. 4 W. 4, r. 2, the points or substance of which must in all cases, whether of general or special demurrer, be *concisely stated in the margin*, and if frivolous the opponent may *with leave* sign judgment; the party whose pleading is objected to, thereupon either applies for leave to amend, or if he be advised that his pleading is sustainable, or that the previous pleading of his opponent is substantially defective, he *joins in demurrer*, and thereupon one of the parties *sets down* the demurrer for argument, and *paper books* are to be delivered to each of the four judges presiding during that term, who, on the two appointed days in each week during the term, hear the arguments of counsel, and give judgment upon the matter of law thus brought before them.

When the defect in the *pleadings* is substantial, or not aided either by the common law or by the above or any other statute of amendment or jeofail, then, even after verdict, the party may *move in arrest of judgment*, or for judgment in his favour *non obstante veredicto*, or notwithstanding the verdict, or may sustain a writ of error in the Exchequer Chamber or the House of Lords.

So, *pending* a trial, if the learned judge should inadvertently admit evidence by law inadmissible, and which is objected to at the time, a *bill of exceptions* may be tendered by the party who supposes he may be thereby prejudiced, and if the judge should misdirect the jury upon the *effect* of the evidence, then the party may tender a demurrer *to the evidence*, and by either of these proceedings the question of *admissibility* of the evidence or on its *effect*, may be formally brought before the Court

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in banc, and even afterwards discussed in a *Court of Error*, viz. the Exchequer Chamber or House of Lords, though in actions of small importance, to save expense, it is more usual for the judge expressly to reserve the point or give the parties liberty to move to enter a nonsuit, or for a new trial, or to state a special case.

Irregularities arising either in *practical forms* or in the *time* or *manner of conducting* the *practical* proceedings in an action for the plaintiff or the defendant, and in every stage from the affidavit to hold to bail, and the issuing process, whether serviceable or bailable, to the levy of execution, and even the entry of satisfaction of the judgment on the record, constitute unhappily too frequent subjects of application to a judge, or to the Court, and until professional men shall have become more liberal, or the temptation of obtaining *costs*, however small, from the opponent, shall have been removed, or greatly limited by new regulations, it is to be feared will continue.

The judges who would introduce a general imperative rule, that no irregularity or objection, either in pleading or practice, should be taken advantage of, unless the party objecting shall have first given to his opponent notice of the objection, and afforded him a reasonable opportunity of rectifying it, without great increase of expense, would deserve the thanks of the profession and of the public; of the former, in consequence of being rendered more respectable; and of the public in respect of the amelioration in the administration of justice.

IV. Modes of proceeding relating to each.

IV. As regards the *modes* of proceeding, very little consideration will demonstrate that, as it is a principle in the administration of justice that the parties to a suit shall in most cases have the benefit not only of the decision of a single judge, but also of the Court in banc, and even of a Court or Courts of appeal, upon their *substantial rights*, all parts of the proceedings in which the *right* or *defence* is stated, viz. the *pleading*, together with bills of exceptions, demurrers to evidence, and special verdicts, and judgments, must be stated *with formality on the record*, so that there may not afterwards in a Court of appeal be any difficulty in ascertaining the precise point that has arisen and is to be discussed, and any supposed insufficiency in the *pleadings* must, for the same reason, be pointed out by demurrer, and if a mere technical objection to the pleading, by *special* demurrer, so as to notify the objection to the opponent, and afford an opportunity of amending.

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With respect to the *practical proceedings*, or modes of conducting the action or defence, and which are certainly of minor importance to the *pleadings*, they do not appear on the face of the record; and if there be any objection, there are two modes of bringing it forward for decision, viz. by *summons* before a judge, or by *motion* to the Court in *banc*. The general rule is, that when the defect in a *practical proceeding* is of comparatively *small importance*, then, to avoid the costs of *affidavits*, *briefs* to counsel, rules nisi, affidavits and briefs to counsel in answer, and rules absolute, the application should be made to a *single judge at chambers* by *summons*, and his *order* be obtained, though sometimes particular statutes expressly require matters much of course to be disposed of *in banc*, and in those cases a single judge has no jurisdiction at chambers. (*b*)

As many questions of *irregularity*, especially those affecting the practice of *all* the Courts, require considerable discussion and consideration, there are numerous points that must be, or usually are, decided upon in banc. Indeed *the costs of proceedings* are now frequently even more important than the principal subject-matter in dispute, and therefore the parties are usually anxious to obtain the decision of the higher tribunal, i. e. *the judges in banc*. (*c*) In the first chapter of this volume, we concisely considered what proceedings usually take place in banc, what in the Practice Court, what before a single judge at chambers, what before the master or prothonotary, what before a judge at nisi prius, and what before the sheriff or his deputy upon a writ of inquiry or writ of trial. All those subjects will in the following pages be more fully considered in distinct chapters.

V. Enumeration of the principal recent alterations and improvements.

V. *Enumeration of recent improvements.*—In the present reign, *great improvements* in practice and pleading have been established; 1st, In assimilating the process and practice in the three superior Courts, before very multifarious, contradictory, perplexing, and consequently hazardous. 2ndly, By abolishing many useless proceedings pending an action, occasioning unnecessary expense. 3rdly, In very materially shortening the pleadings, and simplifying the issue to be tried. 4thly, In requiring all pleadings to be *delivered* to the opponent or his attorney, instead of being filed. (*d*) 5thly, In

(*b*) *Ante*, vol. iii. 24, 26, 27.

(*c*) See *ante*, vol. iii. 7, as to the advantages resulting from a discussion in *full Court*; and see *Beck* v. *Young*, 1 Crom. M. & Ros. 41, and 3 Dowl. 280, where a very learned judge candidly admitted that he had erroneously decided, *Beck* v. *Young*, 2 Dowl. 462.

(*d*) Reg. Gen. Hil. T. 4 W. 4, r. 1. Except in cases where the plaintiff has entered an appearance for the defendant, in consequence of his neglect, and neither

CHAP. XIV. reducing the number of witnesses, and the expense of evidence on a trial. 6thly, In enabling a judge or sheriff to *amend* variances appearing during a trial. The practice has in these and some other respects been altered, and in many respects improved, during the few years of the present king's reign, in a manner unparallelled at any other period of history, and to a degree entitling the judges to the warmest thanks of the community.

Proposed arrangement of the subjects.

It is proposed in the following pages to examine most of these several proceedings, as well those which are ordinary, or only occasional, or which are attributable to informalities in the pleading, or irregularities in the practical proceedings, in one continuous view, introducing each at the stage in the cause when it usually occurs; and sometimes suggesting when or not it may be advisable to resort to a Court of equity, or to adopt some cross adverse proceeding.

With respect to the *arrangement* of these subjects, authors have differed. Mr. Tidd has, in his justly admired treatise, considered as well the *ordinary* proceedings as the *occasional* proceedings, and those which are *defective* or *irregular*, and the modes of objecting *in the usual and natural order of a suit, and at the times when each of these proceedings usually arise;* whilst in Mr. Serjeant Sellon's Practice and other more recent treatises, the *ordinary* and *regular* proceedings are *first separately* considered, and the *occasional* and *irregular* proceedings are examined in a second part or volume. In this summary of the *present* practice, Mr. Tidd's arrangement will be preferred.

the residence of the defendant or of his attorney be known, in which case, though only with leave of the Court or a judge, the declaration may be *filed*, and notice thereof stuck up in the office. *Martin* v. *Colvil*, 2 Dowl. 694; *Watson* v. *Delcroix*, *id.* 396.

CHAPTER XV.

OF THE INSTRUCTIONS FOR DECLARATION AND THE DECLARATION ITSELF, AND PROCEEDINGS THEREON AS PRACTICALLY AFFECTED BY THE RECENT STATUTES AND RULES.

SECT. I.—OF THE INSTRUCTIONS FOR DECLARATION, AND PROFESSIONAL DUTY IN THIS RESPECT.

CHAP. XV. INSTRUCTIONS FOR DECLARATION, &c.

I. *Of the Instructions for Declaration*, and professional duty in this respect.

IMMEDIATELY after the defendant has been served with process, or arrested, (and indeed even before issuing the writ in cases of difficulty,) it is advisable on the behalf of the plaintiff to *expedite* his action by causing his declaration to be *prepared*. And for that purpose, whether such declaration is to be drawn or settled by the plaintiff's attorney, or by a pleader, or barrister, it is always advisable, first, to prepare *full written instructions*, by stating with great care, accuracy, and consideration, all the facts, as well relating to the *plaintiff's cause of action*, as to the *expected defence*, because the very act of

(*a*) At the head of each of the last four divisions in this analytical table there will be found *numerous subdivisions*, in order to render the arrangement more perspicuous and the points more readily accessible.

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reducing the statement *into writing* will necessarily secure more particular examination and a more accurate view and deliberation upon the facts. (*b*) The instructions *to sue*, if obtained before issuing the writ in the manner already stated, (*c*) together with a statement of any subsequent discoveries, and a copy of the præcipe for the writ, or at least a statement of the exact *form of action* named in the latter, would in general suffice. In preparing the instructions for the declaration, practitioners are to keep in view two very serious and responsible duties to which the law subjects them. *First*, They must not be satisfied with receiving and communicating to the pleader or barrister the statement merely of the client, but they should exert a diligent and acute inquiry into the *evidence* in support of the statement of every fact that might either substantially or technically affect either the plaintiff's cause of action, or the form of the declaration or the defence. (*d*) And the barrister settling the declaration also should exercise similar care, and, until he be satisfied, should require *further instructions*. Thus, in a recent case, although the client instructed his attorney that his claim was so much for use and occupation, and the attorney caused the declaration to be framed in *assumpsit* for *use and occupation*, and it afterwards appeared that the rent was due upon a *lease*, of which the defendant had executed a counterpart *under seal*, and thereupon it became necessary to commence a fresh action of *covenant*, the Court held that the attorney had been guilty of *crassa negligentia*, for that it was his duty pressingly to have inquired of his client whether there was a lease, and to have examined it. (*e*) *Secondly*, it is the duty of the plaintiff's attorney, even after the declaration has been settled by counsel, to examine the same with care, and he is bound well to know every count therein, (*f*) and to consider, not only whether the declaration, as a whole, has been properly framed, but whether there are too many counts, or one which would subject the plaintiff to any costs if he did not succeed; (*f*) and if he doubt, he should suggest such doubt to the barrister who settled the draft, and in pru-

(*b*) *Ante*, part v. vol. iii. 117—125.

(*c*) *Ante*, vol. iii. 117—125.

(*d*) It would afford no excuse to say, How can it be expected that I should incur the trouble and expense of a minute inquiry and examination of perhaps distant witnesses for the trifling fee of 6s. 8*d*. allowed in taxing costs for instructions for a declaration? The answer is, that the plaintiff's attorney should suggest to his client the necessity for full inquiries, and in the presence of a witness obtain instructions to examine each witness, and then he might sustain charges for his actual journies, attendances, and expenses.

(*e*) *Cliffe* v. *Prosser*, 2 Dowl. 21.

(*f*) Per Lord Lyndhurst in *Tomlinson* v. *Nanny*, 2 Dowl. 17.

dence obtain his decided opinion that the declaration is proper. A similar duty attaches on the attorney for a defendant.

SECT. II.—KNOWLEDGE OF PLEADING WHY ESSENTIAL TO AN ATTORNEY.

II. Knowledge of pleading essential to whom; and considerations how far it is advisable for an attorney to interfere in drawing pleadings and whom to retain.

It would be desirable for every attorney, by his attention to the subject during his pupilage, or by subsequent study, to render himself *competent* not only to save his client some expense, but in all cases *to secure the accuracy of the pleadings by studying* the subject of *pleading*, now so intimately connected in several respects with practice; and thus to *qualify himself to draw declarations*, at least in actions upon bills of exchange, promissory notes, and for small and common debts, whether in assumpsit or debt, or even in those actions where the forms are generally fixed, as upon a policy of insurance, warranty of a horse, covenant for rent, and a few others; and in most cases at all events to be able to judge of the due application of pleadings framed by a barrister or pleader to the facts of the case; and if he doubt, to suggest alterations. (*g*) The ablest pleader may occasionally *misunderstand facts*, or *misapply* the best *precedents*; and a client's success, or at least his liability to some, if not all the *costs*, *may frequently depend on the suggestions of his attorney*. But, with the exception of the most common debts, as upon a tradesman's or workman's bill against his customer or employer, or a claim for money lent, the modern rules have certainly rendered it most prudent for the plaintiff's attorney to avoid censure and personal responsibility by laying full and accurate instructions for the declaration before a barrister of some standing, (*h*) either to prepare or settle the draft already prepared as before suggested, or an *experienced pleader*. (*i*) And where the prin-

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(*g*) I have purposely prepared the *sixth* edition of my Treatise on Pleading on a plan adapted not merely for the assistance of special pleaders, but also for the use of *all practitioners* in the Common Law Courts. The new rules of pleading, especially those of Hil. T. 4 W. 4, have rendered such adaptations essential; and it will be found that in future every attorney must make pleading a part of his study and attainments, or he will be incompetent to conduct an action with safety to its conclusion.

(*h*) In general, if an attorney has caused the pleadings to be settled by *counsel*, and they should turn out defective, without any fault *in the instructions*, the attorney will thereby be protected from personal liability to his client, and may even recover his fees, *ante*, vol. ii. 22, 32, 33; *Potts v. Sparrow*, 6 Car. & P. 749; *Harris v. Dalby*, K. B. 9 Feb. 1835, MS. Another advantage results, viz. that the counsel who has settled pleadings necessarily considers himself more particularly called upon to support them.

(*i*) In using the term *experienced* it must be understood that after a student

cipal attorney, or an intelligent clerk, who has fully examined into the facts and evidence, is in or near the metropolis, it may be advisable to have *a conference* with the gentleman who is to settle the draft, by which frequently important facts or evidence may be elicited that would otherwise escape attention until too late. (*k*)

In general *copies*, and not original documents, should accompany the instructions, unless the making copies would occasion considerable expense. It is desirable to give full copies, and not mere abstracts, for an experienced pleader, without regard to increase of labour, will always, in order to secure accuracy, prefer the *fullest* instructions, however voluminous, to a mere analysis, so as to enable him to frame and complete the declaration in the *first instance;* for if not *then* perfectly applicable to the real state of facts, it will frequently occur that adequate alterations cannot, or at least may not, afterwards be so well introduced as in the original structure. For the same reason it is preferable (with the exception of copies in draft size of the parts of written agreements, leases, charter-parties, or other documents which it may be confidently expected will be set forth in the declaration, and which would therefore save time,) not to attempt to assist the pleader by laying before him a ready prepared draft, unless in the most ordinary cases, but rather to leave him to frame the entire declaration according to his own uninfluenced original view and judgment. (*l*)

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has seen practice in the office of a barrister or special pleader known to have had *considerable* business for an *adequate time*, and has also *very sedulously studied* the law in general for two or three years, his zealous and anxious attention to any business confided to him will probably make up for his want of *great* experience, and the amiable and friendly desire to encourage a beginner may with propriety be indulged. But it should be understood that no practitioner who justly attends to *his client's interest*, or who duly regards his own responsibility, will be justified in countenancing the scarcely honourable practice, of late too prevalent, of some persons assuming to practise as pleaders without having been pupils or seen practice in a pleader's office *for more than a year, or even half a year, when at least two years, besides considerable private reading, are indispensable.* It is degrading to the profession, and dangerous to suitors, that any person, merely because he has professional *connection*, should convert a scientific profession into a mere venial trade, and assume to practise when he must know that he possesses too little theoretical and still less practical knowledge. If this practice should continue to be tolerated by practitioners, there will be no limit to vexatious nonsuits and illjudged defences. In the recent reports of decisions numberless cases of manifestly defective pleadings, even in actions on bills of exchange, will be found evidently drawn by persons who scarcely knew the name of that instrument, and some cases in which, by the mispleading, the parties were deprived of a valid and just defence.

(*k*) It may be proper to intimate, that such a conference, merely more effectually to secure accuracy in the pleadings, should be without additional fee or expense to the client.

(*l*) I have known pleaders under the bar less careful, if not slovenly, in their drafts, when they have ascertained that they are to be settled by counsel; whilst some counsel, relying too much on the supposed accuracy of the pleader, have overlooked the previous want of care, and the client has in the result suffered.

SECT. III.—HOW TO ENFORCE INSPECTION AND COPY OF DOCUMENTS, IN ORDER TO PREPARE DECLARATION.

III. How to enforce an inspection and copy of a written document in possession of a defendant, in order to declare thereon. (m)

Anciently, if a plaintiff had neglected to secure in his possession a part of a deed or agreement, wanted in order to frame his declaration, he was obliged to file a *bill in a Court of equity for a discovery*, (n) and this is still sometimes necessary; but now, to save the expense and delay of that proceeding, it is an *established* practice in most cases, when essential for the purposes of justice, that if a defendant has in his possession the only original document executed by him, and he upon due application has refused to produce the same for inspection, or to deliver a copy, a judge at chambers will make an order, or the Court a rule, for the defendant to produce the document, and give a copy to the plaintiff, at his expense, *in order that he may declare thereon*, and even to produce the same before the commissioners of the Stamp Office, to be stamped, or to the plaintiff's attorney, in order that he may ascertain the names of the witnesses, so as to subpœna them. (o) And it has been further ordered, that the defendant shall produce the original document on the trial; (p) and a defendant has no right to impose terms on the plaintiff, as to admit a tender, or that he shall refer to arbitration. (q) Indeed it is said that Lord Mansfield laid down a rule that *whenever* a party would be entitled to a *discovery*, he should have it at *law*, without going *into equity*, (r) but that position is much too broad and unqualified; and recently a bill, in which it was proposed to compel extensive discovery at law, was negatived in the House of Lords. (s) And in an action against the marshal for an escape, the Court compelled him or his officer to permit the plaintiff to inspect the writ of habeas corpus and return, and the commitment thereon. (t) But in an action of debt against the bailiff of Dover Castle, for extortion on taking a bail bond under a warrant, a learned judge at chambers refused an order for a copy

(m) See in general Tidd, 9 ed. 589 to 596; 2 Arch. K. B. 4 ed. 870 to 874.

(n) See *ante*, vol. ii. 48 to 55; and see the Newspaper Act, 38 Geo. 3, c. 78, sect. 28.

(o) Tidd, 9 ed. 487, 589 to 596; 2 Arch. K. B. 870 to 874; *Wright* v. *Cross*, 2 Dowl. 651, n. (a); *Reid* v. *Colman*, 2 Cr. & M. 456; 4 Tyr. 274; 2 Dowl. 354, S. C.; *Vaughan* v. *Trewent*, 2 Dowl. 299.

(p) *Morrow* v. *Saunders*, 1 Brod. & B. 318; 2 Arch. K. B. 4 ed. 871; but see *Doe* v. *Slight*, 1 Dowl. 163.

(q) *Read* v. *Coleman*, 2 Dowl. 354; 2 Cr. & M. 456; *Vaughan* v. *Trewent*, 2 Dowl. 299, S. P.

(r) *Barry* v. *Alexander*, Mich. 25 Geo. 3; K. B. Tidd, 9 ed. 592.

(s) Lord Wynford's Bill in Lords, A. D. 1833; and see the practice and instances, Tidd, 9 ed. 589 to 596; 2 Arch. K. B. 4 ed. 870 to 874.

(t) *Fox* v. *Jones*, 7 Bar. & Cres. 732; 1 Man. & Ryl. 570, S. C.; *Cooper* v. *Jones*, 2 Maule & Sel. 202.

CHAP. XV. Enforcing Inspection of Documents.

or inspection of the warrant to enable the plaintiff to declare accurately, stating such warrant. (*u*) The last, and some other contradictory cases, appear to render it expedient, in support of a summons of this nature, *by affidavit*, (*x*) very distinctly to show that every other expedient to obtain the requisite information has been tried without effect, and that an order is essential for the purpose of justice, and also to be prepared with a reported decision precisely in favour of the particular application. (*y*) In order to support an application to a judge or the Court, *a civil letter*, requesting an inspection of the document, and a copy, at the expense of the plaintiff, and stating the necessity for a copy, in order to declare, should first be written to the defendant or his attorney, and if refused, then every other means should be adopted to obtain a copy, as by applying to the attorney who prepared the document, for a copy of his draft. If all exertions should fail, then an affidavit, shortly stating the nature of the action, and that it is for a just demand, and that the defendant has in his possession the only document, (showing under what circumstances, if favourable to the application, as that at the time the original was delivered to him it was agreed that the plaintiff should at all times have access to it,) and that the defendant has refused, upon a civil

(*u*) *Ante*, vol. iii. 352, note (*o*); *sed quære*, the cases in the last note were not cited.

(*x*) In the K. B. [*or* "C. P.," *or* "Exch. of Pleas."]

Between { A. B. Plaintiff, and C. D. Defendant.

Affidavit to ground an application to obtain inspection of an agreement.

A. B. of ——, [*builder*,] the above-named plaintiff, and P. A. of ——, his attorney, severally make oath and say, and first this deponent, the said A. B., for himself saith, that on or about the —— day of ——, he this deponent entered into a contract in writing with the above-named defendant, for [*the building of a house, No.* ——, *in* —— *street, in the county of* ——], which said contract was left in the custody of the said defendant; and the said A. B. and P. A. severally say, that they verily believe that the said contract is still in the custody of the said defendant, or his attorney, and that the plaintiff is entitled to recover in this action. And this deponent P. A. says, that he did, on, &c. apply to and request the said defendant to allow an inspection of the said contract by him, as the attorney of the said plaintiff, and to give him a copy thereof, at the same time offering to pay the charges so to be incurred on that account, and that the said defendant did not give either the said inspection or copy [*but referred this deponent to his attorney, Mr.* ——, *of, &c.*] And this deponent further saith, that he did, on, &c. apply to the said Mr. ——, and request inspection and copy of the said contract, and then offered payment for the same, but that he could not obtain either an inspection or copy, and that this deponent did then inform the said Mr. ——, that unless the same was supplied on or before the —— day of, &c. instant, he should consider that such inspection and copy were refused. And these deponents severally say, that the said inspection and copy have not, nor hath either of them been yet granted to them, or either of them, or to any other person on the account of the said plaintiffs. [*State any other fact that may induce the Court to grant the application, as that the plaintiff has no counterpart or copy, &c.*] Sworn, &c.

A. B.
P. A.

(*y*) See the decisions collected in Tidd, 9th ed. 589, &c.; 2 Arch. K. B. 4 ed. 870, &c.

application, (annexing a copy of the letter,) to comply therewith, and that all other means to obtain a copy have been used without effect, and then showing that the plaintiff has been advised, and verily believes, that a copy is essential to enable him to declare. (z) It has however been held not to be necessary that the affidavit should disclose the nature of the action, (a) though still it will be advisable to show that it is justly sustainable.

The application now ought in the first instance to be *by summons*, and not even to the Practice Court, or still less the Court in banc, (b) though formerly it was certainly the practice to apply to the Court. (c) And although the Court in banc unquestionably *may* interfere and make a rule to the same effect, yet unless there has been a previous application to a judge at chambers, they will either refuse the costs of the application, or direct that no more costs shall be allowed than if the application had been made to a judge at chambers, or direct that the expenses shall be costs in the cause. (d) It is usual, when the document has not been stamped, to make it part of the application that it be produced at the Stamp Office; but as the proper stamp and penalty must in that case be immediately paid by the plaintiff, so much of the application seems premature, for the expense of the stamp and penalty might be saved by the subsequent course of pleading, or by admissions; and therefore it is advisable not to make the production at the Stamp Office, or the stamping, part of the application for a copy, but to delay an application for the latter purpose until a reasonable time before the trial. (e)

(z) As to this affidavit, see *Rundle* v. *Beaumont*, 1 M. & P. 396; *Morrow* v. *Saunders*, 3 Moore, 871; 1 Brod. & B. 318, S. C.

(a) *Morrow* v. *Saunders*, 3 Moore, 871; 1 Bro. & B. 318, S. C.

(b) *Wright* v. *Cross*, 2 Dowl. 651, note (a); *Reid* v. *Coleman*, 2 Cr. & M. 456; 3 Dowl. 354; *Vaughan* v. *Trewent*, 2 Dowl. 299. The terms of the *summons*, or rule, when necessary, will be "to show "cause why the defendant shall not pro-"duce to the plaintiff or his attorney an "agreement between the plaintiff and "the defendant, supposed to bear date "on, &c. and at the expense of the said "plaintiff, deliver to him a copy of such "agreement, to enable him to declare "thereon, and forthwith produce the said "agreement at the Stamp Office at So-"merset House, to be stamped at the "expense of the plaintiff, and be pro-"duced in evidence by the said defend-"ant, on the trial of this cause." But the *stamping*, as suggested in the context, may be delayed until a subsequent stage in the cause.

Form of summons to produce, &c.

(c) Tidd, 9 ed. 589, 590.

(d) *Reid* v. *Coleman*, 2 Cromp. & Mee. 456; 2 Dowl. 354; *Vaughan* v. *Trewent*, 2 Dowl. 299; *Wright* v. *Cross*, 2 Dowl. 651, (a); 2 Arch. K. B. 4 ed. 872.

(e) Especially as the proceedings under Reg. Gen. Hil. T. 4 W. 4, r. 20, would now probably lead to an admission of the written document, or that an unstamped copy shall be read in evidence. *Post.*

SECT. IV.—TIME OF DECLARING.

IV. Of the *time* of declaring in general.

The *Declaration* being the full statement of the plaintiff's complaint, or cause of action, is by far the most important part of the formal proceedings in an action. It may here be considered as regards the *time* of declaring and the *mode or form* of declaring.

There is a striking dissimilarity between the practice of Courts of equity, and ecclesiastical and spiritual, and some other Courts, and that of Courts of law, as regards the *time* of fully stating the *complaint* of the suitor, and as it seems in favour of the former on principle. In Courts of equity the complainant must in general *first* file his *bill*, which is equivalent to a declaration at law; and there is an express enactment that no subpœna or any other process for appearance do issue out of any Court of equity till after the bill is filed with the proper officer, except in cases of bills for injunctions to stay waste, or stay suits at law commenced. (*f*) So in the ecclesiastical and spiritual Courts, the complainant's *libel* is first exhibited, and the *citation* (which answers to the process at law and subpœna in equity) is subsequently issued. But at law, in all cases of *personal* actions, especially now that original writs have been abolished, the process to bring the defendant into Court, we have seen, is very general, at most stating the *form of* action very concisely, as "to answer the plaintiff in an action upon promises," and the plaintiff's full statement of his complaint, called his *declaration*, cannot, according to the present practice, be filed or delivered, until eight days after

(*f*) 4 Ann. c. 16, s. 22.

the process has been executed by service or arrest; nor in the instance of mere serviceable process, until the defendant has actually appeared, or the plaintiff has entered an appearance for him; and although the defendant resides in or within twenty miles of London, he is unnecessarily allowed *eight days* merely to prepare for the very simple act of entering what is termed a common appearance; and though the modern practice has been professedly altered so as to *expedite* the proceedings in an action in other respects, yet the plaintiff's proceedings are, as it is submitted unnecessarily, suspended during that time, when before a plaintiff was allowed to hasten a plea by declaring de bene esse. But the practice as to the time of declaring requires more particular examination.

1st. How soon formerly and at present plaintiff may declare.

First, how soon a Plaintiff may declare.—We have before intimated the expediency of having the declaration *prepared* as early as practicable, so as to be *ready* for delivery or filing as soon as the rules of practice will permit, and thus to expedite the trial of the action. It is a general maxim *vigilantibus non dormientibus leges subserviunt*, and the very fact of a plaintiff declaring, as he is permitted, induces a presumption and feeling in his favour, in many instances productive of actual practical advantage.

According to the *natural course* of proceedings, and especially with reference to the period of legal history, when the pleadings were *ore tenus*, there could be no declaration, until after the defendant had *actually appeared*, and was in Court *to hear the complaint*. But in modern times, in order to expedite the proceedings, a plaintiff was, before the uniformity of process act, 2 W. 4, c. 39, allowed in certain cases, as well of serviceable as bailable process, to declare, as it was technically termed, *de bene esse, i. e. conditionally*, not only before the defendant had appeared to serviceable process, or put in bail to bailable process, but also before the time for either purpose had expired; by which means the defendant, being in possession of the plaintiff's full statement of his cause of action, was enabled to prepare his plea, and the proceedings were expedited by a *part of the time allowed for pleading being current during the time allowed for appearing or putting in or perfecting bail*, and this advantage still prevails, though to a diminished extent, in *bailable process*; and there was nothing unreasonable in that practice, because the defendant, having received the declaration, might immediately be preparing his plea, and deliver the same before the expira-

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tion of the requisite time, provided he resolved to defend. But it seems that this liberty of expediting the suit having been vexatiously abused by practitioners issuing process returnable on the very day it was served, and then declaring *de bene esse* even on the same day, and thus subjecting the defendant to the expense of a declaration, before he could consult his attorney and tender the debt and costs; rules, therefore, were promulgated, restraining a plaintiff from declaring de bene esse until the expiration of *several days* after the service of process. (*g*)

2. The practice of declaring de bene esse on *serviceable* process *impliedly* abolished.

And *now* as the 11 G. 4, and 1 W. 4, c. 70, and the uniformity of process act, 2 W. 4, c. 39, have, by enabling a plaintiff to enter an appearance for the defendant on the ninth day after he has been actually served with process, and immediately afterwards, to declare and further proceed, and also to declare and insist on a plea pending the *vacations*, as well as in the terms, (excepting between the 10th August and 24th October,) and has in other respects greatly expedited the proceedings in an action, it has been considered that there became less occasion for the practice of declaring de bene esse, and that mode of declaring is now *confined* to *bailable process*, and a plaintiff cannot in any case declare on mere *serviceable* process against a *single* defendant before an *actual appearance has been entered* by the defendant himself, or by the plaintiff for him, and then the declaration must be delivered or filed *absolutely* and not *conditionally*. (*h*) By the terms of the 2 W. 4, c. 39, s. 1,

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(*g*) Reg. Gen. Trin. T. 1 W. 4, reg. 10, prohibiting a declaration being delivered until the expiration of *six days* after the service of *serviceable* process, or *six days* after *arrest* on bailable process; and see Jervis's Rules, 80, note (*a*).

(*h*) So decided, *Fish* v. *Palmer*, 2 Dowl. 460. In Tidd's Supp. 1833, p. 129, it is merely said, there is *no occasion* to declare de bene esse on serviceable process. In 1 Arch. Prac. C. P. 68, and in 1 Arch. K. B. 4th edit. 210, it is laid down peremptorily that the plaintiff cannot now declare on serviceable process; but see Atherton, 102. The technical reason why a plaintiff cannot now declare *de bene esse* on *serviceable* process is, that the present serviceable process under 2 W. 4, c. 39, by writ of summons or distringas, is not like the former bill of Middlesex, writs of latitat, capias, and quo minus, (now abolished,) to be considered process against the person, within the meaning of the rules allowing a plaintiff to declare *de bene esse*; see R. T. 22 G. 3; R. M. 10 G. 2, 1 Sellon, Prac. 226, 227. Another reason was, that formerly no declaration *de bene esse* could regularly be delivered before the return day of process, and now there is *no return day*. It is submitted, however, that at least after the expiration of the *four days* allowed for the payment of the debt and costs of writ and service, without further expense, a plaintiff might with propriety, subject to a qualification *by a new rule of Court*, be allowed to declare *de bene esse*; for otherwise, in the case of *serviceable* process, the defendant is allowed more time than is necessary to appear, and before he can be compelled to plead, viz. *eight* days after service of process, and *eight more* after declaration, i. e. *four* days in a town cause, and *eight* days in a country cause, before he can be required to plead. It is submitted that such twelve or sixteen days are unnecessary, and occasion useless delay in an action.

and the form of the writ of summons thereby prescribed, *all* proceedings are impliedly suspended during the first eight days after the service of the writ, (*i*) and as on the ninth day the plaintiff may enter an appearance for the defendant, and immediately declare absolutely, there could be little if any utility in permitting a declaration de bene esse on such ninth day, nor any occasion for such proceeding. (*k*) Indeed, now the delivery of a declaration before an appearance has been entered, either by the defendant or the plaintiff for him, is such a nullity, that a subsequent judgment by default would be set aside, notwithstanding delay in the application and a subsequent step taken by defendant. (*l*)

The defendant, we have seen, is in all cases, without regard to the distance from London where he was served, entitled to eight days, inclusive of the day of service, to enter his appearance, and during that time the plaintiff *cannot* increase the expense by *actually delivering* a declaration, and if he do, it would be irregular, though in the mean time the declaration may be *prepared*, as presently noticed. If the defendant appear on the eighth day, then immediately afterwards the plaintiff may deliver his declaration *absolutely;* and if the defendant do not appear, the plaintiff may enter an appearance for him, and then declare, and thereby press on the suit.

3. But may now declare de bene esse on bailable process on eighth day after arrest under Reg. Gen. M. T. 3 W. 4, r. 11.

In *bailable* process, we have also seen, that the defendant ought, in eight days inclusive of the day of arrest, to put in bail above; but as the plaintiff cannot effectually on the ninth day *put in or perfect bail above for the defendant*, the Reg. Gen. Michaelmas Term, 3 W. 4, reg. 11, justly allows the plaintiff in this case of *bailable* process, to avoid the consequences of the defendant's neglect to put in or perfect bail on the eighth day, by allowing the plaintiff on the ninth day after the arrest, inclusive thereof, to *file* (*m*) his declaration *de bene esse*, so that the defendant's time for pleading immediately begins to run from such ninth day. This rule orders that upon all writs of capias, where the defendant shall not be in actual custody, the plaintiff, at the expiration of eight days after the execution of the writ, inclusive of the day of such execution, shall be at liberty to *declare* (*n*) *de bene esse* in case

(*i*) 1 Arch. C. P. 67, 68.

(*k*) Tidd's Supp. 1833, p. 123.

(*l*) *Roberts* v. *Spurr*, 1 Har. & W. 201.

(*m*) *File*, but not *deliver*, as the defendant is not completely in Court until bail above have been put in and justified when excepted to, Rex v. *Sheriff of Middlesex*, 3 Dowl. 188; see Reg. Gen. 3 W. 4, Reg. 11.

(*n*) Not saying whether the declaration is to be *filed*, or *delivered*, see note, *supra*.

special bail shall not have been perfected; and if there be several defendants, and one or more of them shall have been served only, and not arrested, and the defendant or defendants so served shall not have entered a common appearance, the plaintiff shall be at liberty to enter a common appearance for him or them, and declare against him or them *in chief* (o) (i. e. *absolutely*) and *de bene esse* against the defendant or defendants who shall have been arrested, and shall not have perfected special bail; and upon this rule it has been considered that, although no bail has been *put in*, yet the plaintiff may equally declare de bene esse, as where they have been put in and have not yet justified, and that the plaintiff have neglected so to declare, neither the bail-bond nor attachment were to stand as a security. (p)

Upon a prior rule it was held that a plaintiff may declare *de bene esse* at any time after the eighth day, and after bail above have been put in, provided they have not yet *perfected*; (q) and if plaintiff were to declare absolutely before bail has been perfected, he would waive their justification. If a plaintiff should declare *absolutely*, either on serviceable or bailable process, before the defendant has appeared or put in bail above, the defendant might obtain a summons to set aside such declaration and all subsequent proceedings for irregularity, (r) unless the defendant should have waived the irregularity by taking the declaration out of the office; (s) but the defendant's merely examining the outside of the declaration, or inquiring the form of action therein, when filed, would not waive such irregularity; for so far a defendant has a right to examine and inquire, without any admission that the plaintiff's proceeding is correct. (t) If the plaintiff declare absolutely after bail above have been put in, but before they have justified, although his proceeding is regular, yet he thereby waives the justification, because, by so declaring, he admits the defendant to be perfectly in Court. He ought in such case to have declared conditionally, until such bail should have perfected.

4. Unless indorsed debt

Unless, however, a defendant pays the debt and costs in-

(o) It has been correctly observed that instead of the words "*in chief*," the expression should have been "*absolutely*."

(p) Per Parke, B. in *Rex* v. *Esser*, 2 Dowl. 618.

(q) *Wandover* v. *Cooper*, 10 Bar. & Cres. 614; and see *Rex* v. *Sheriff of Middlesex*, 2 Dowl. 185; *Rex* v. *Sheriff of Essex*, 2 Dowl. 618.

(r) *Gilbert* v. *Kirkland*, 1 Dowl. 153; Bagley, Chamber Prac. 190, 1914.

(s) *Gilbert* v. *Kirkland*, 1 Dowl. 153, where it seems also to have been considered irregular to declare conditionally after the time for appearance had expired.

(t) *Id.*; *Robins* v. *Richards*, *id.* 379.

dorsed on the writ *within the four days*, as intimated by the indorsement made in pursuance of Reg. Gen. Hil. Term, 2 W. 4, reg. 2, and Reg. Gen. Mich. T. 3 W. 4, Reg. 5, the plaintiff is entitled to prepare and be paid for his *affidavit* of the service of the writ. If the defendant were to apply by summons to stay proceedings on payment of debt and costs on the sixth day, returnable on the seventh day, inclusive of the day of service, the plaintiff would not be allowed the charges of drawing the declaration or pleader's fee, unless in cases where the sitting after term or the assizes are so near as to render a day's expedition very essentially important. If the application should be made on the seventh day by summons, returnable on the eighth day, then instructions for declaration and drawing declaration, if actually drawn, and pleader's fee, in cases where his preparing the declaration would be reasonable and proper, would in general be allowed; but the allowance of the costs of declaration varies according to the discretion of the taxing officer. The defendant will, as well in cases of serviceable as bailable process, be *liable to pay the costs* actually incurred after such four days in *preparing* the draft of the declaration, although he offer to pay the debt and costs on the fifth or subsequent day, because it is reasonable that if the defendant omit to pay within such four days, the plaintiff should be at liberty to *prepare* and perfect his declaration ready for delivery immediately after the eighth day. Hence the practice is that if the defendant, after *the fourth day* after service or arrest, obtain a summons to stay proceedings on payment of debt and costs, no order will be made, except on the terms of his paying the costs of preparing declaration when actually incurred.

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and costs paid within four days, how soon plaintiff will be entitled to costs of preparing declaration after that time.

It is advisable, and in general the duty of the plaintiff's attorney, to declare *de bene esse* in *bailable* process, on, or as soon as he can after the *eighth* day after the arrest, (which must now first expire under Reg. Gen. Mich. T. 3 W. 4, reg. 11,) not only with the view of expediting the suit, but also because an express rule renders it essential that the plaintiff should have so declared in order to induce the Court to order that a bail bond, or an attachment against the sheriff, shall stand as a security, for otherwise it will not be considered that the plaintiff has lost a trial. (*u*)

5. Should declare de bene esse when admissible.

(*u*) *Ante*, vol. iii. 388, 389, 391; Reg. Gen. Hil. T. 4 W. 4, reg. 5.; *Call* v. *Thelwall*, 1 Gale, 16; 3 Dowl. 445, S.C.; *R.* v. *Middlesex*, 3 Dowl. 194; *R.* v. *Middlesex*, 2 Dowl. 434; *R.* v. *Essex* in cause *Alexander* v. *Barrington*, 2 Dowl. 648; *R.* v. *Sheriff of Middlesex*, 3 Dowl. 188; *ante*, vol. iii. 389, 391.

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6. Consequences of defendant perfecting or not perfecting bail after declaration de bene esse.

If the defendant put in or perfect bail after the plaintiff has declared *de bene esse*, then that declaration thereupon becomes absolute, and the plaintiff may proceed accordingly; but if the defendant do not put in or perfect bail when excepted to, the plaintiff cannot proceed on his declaration de bene esse to sign judgment for want of a plea, but can only take an assignment of and proceed in an action upon the bail bond, or proceed to rule the sheriff to return the writ and bring in the body, and move for an attachment in case of default, though the latter proceedings may be stayed upon terms, and afterwards the principal action proceeded in.

7. Difference in the form of proceeding when a declaration is delivered or filed de bene esse.

The *form* of the declaration *itself* is precisely the same, whether delivered or filed absolutely or de bene esse; and the only difference in any part of the proceeding is in the *notice* of the declaration and the *notice to plead*, to be served on the defendant. When the declaration has been filed de bene esse, the notice thereof and to plead, after stating the filing of the declaration, adds, "*conditionally* until special bail be put in [if not already done] and perfected, and unless you appear and plead thereto in *four* days [if the venue be laid in London or Middlesex, and the defendant live within twenty miles of London, or "in *eight* days," if the venue be laid in any other county than London or Middlesex, or the defendant live above twenty miles from London, (x)] judgment will be signed against you by default." When the declaration is *delivered* conditionally, the notice to plead, which in that case may be *indorsed*, runs thus: "This declaration is *delivered conditionally* until special bail be put in and perfected, [or if bail above has already been put in, then only say 'perfected.'] And the defendant is to plead," &c. (as in the preceding form.)

8. By 2 W. 4, c. 39, sect. 11, a plaintiff cannot deliver or file declaration between 10th August and 24th October.

Although under the acts of 11 Geo. 4, and 1 W. 4, c. 70, and 2 W. 4, c. 39, a plaintiff may now deliver his declaration and call for a plea at any time, whether in term or *vacation*, there is in section 11 of the last act an express exception introduced, with a view to secure to legal practitioners and their clients some small vacation, directing that "no declaration shall in any case, either de bene esse or absolutely, be filed or delivered between the 10th August and 24th October." And

And other excepted days.

it would seem that it would be of no avail to deliver a declaration with a notice to plead in Easter Term immediately before

(x) R. T. 22 G. 3; R. T. 1 W. 4.

the Thursday before and the Wednesday after Easter day, because those days are excluded as days of business, and are not to be reckoned or included in any rules or *notices* or *other proceedings*, except notices of trial or inquiry. (*y*)

9. Hour of the day when declaration to be delivered.

The general rule of Hil. T. 2 W. 4, r. 50, we have seen, requires the service of all *rules*, *orders*, and *notices*, before nine o'clock at night. (*z*) But if delivered after that hour, it would not be a nullity, though irregular. (*a*)

10. Within what time the plaintiff *should* and *must* regularly declare, and consequences of neglect.

According to the existing practice, the plaintiff *should* declare before the end of the term *next after* that in which, or in the vacation of which, the defendant was served with process or was arrested, if the defendant entered his appearance, or put in bail, *in the vacation* of such first term, or if the defendant do not appear, then the plaintiff must declare *before the end of the term expiring next after the eighth day inclusive from the execution of the writ*, provided the service or arrest was before the second term; (*b*) and that if the plaintiff do not so declare, and has not obtained a rule or consent for further time, then the defendant, *having duly appeared*, may sign a judgment of non-pros, without ruling the plaintiff to declare, or doing more than *demanding* a declaration in writing, and waiting four days, as hereafter stated; (*c*) or as observed in another work, a plaintiff, to prevent being non-prossed, must declare within *two terms* after the return of the writ, (of which the term in which the writ was *returnable* was one,) that is now (that writs have no return day) after the execution of the writ by *actual service or arrest*, and if the writ be executed in a vacation, the plaintiff must declare before the end of the following term, or a non-pros may be signed; (*d*) but the plaintiff may still have a rule for time to declare, as heretofore. (*d*) In another work it is suggested, that probably the Court, in analogy to the above rule, would not allow the defendant to make a four day's demand of declaration in anticipation of a judgment of non-pros, *until the expiration of the term next after the service or ar-*

(*y*) Reg. Gen. East. T. 2 W. 4, and 11 G. 4, and 1 W. 4, c. 70, s. 6, and 1 W. 4, c. 3, s. 3.

(*z*) *Ante*, vol. iii. 110; 1 Arch. K. B. 4th edit.

(*a*) *Id.*; *Horsley* v. *Purdon*, 2 Dowl. 228; but a case of a plea, not a declaration.

(*b*) Tidd's Supp. A. D. 1833, p. 120; see the statute 13 Car. 2, stat. 2, c. 2, s. 3, allowing a plaintiff two terms before judgment of non-pros, Dax Prac. 54; 2 Salk. 455; 7 T. R. 27; Reg. Mich. 10 G. 2, reg. 2, b.; *Wynne* v. *Clarke*; 5 Taunt. 649.

(*c*) Tidd's Supp. A. D. 1833, p. 125.

(*d*) See Mr. Chapman's second addenda to the new rules, page 115.

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rest, (*e*) and that process would be deemed to be returnable within the rule Hil. T. 2 W. 4, on the day on which it was served or executed. (*e*) But if the writ was not executed until towards the end of a term, it would seem that the plaintiff still ought to have until the end of the next or second term to declare.

Against prisoners.

As respects *prisoners*, the Reg. Gen. Trin. T. 3 W. 4, reg. 1, is explicit that the plaintiff shall declare "against such defendant "before the end of the next term after the *arrest, or detainer*, "*or render, and notice thereof*; (*f*) otherwise such defendant "shall be entitled to be discharged from such arrest or de- "tainer, on entering an appearance according to the form in 2 "W. 4, c. 39, schedule No. 2, unless further time to declare "shall have been given to such plaintiff by rule of Court, or "order of a judge." Since which rule it is necessary for the plaintiff, before the appointed time for declaring has expired, to apply for and obtain a sufficient extension of the time, or the defendant may be discharged. (*g*)

11. How the limited time for regularly declaring is now to be calculated.

It will be remembered, that by the statute 13 Car. 2, stat. 2, c. 2, s. 3, as to a non-pros for not declaring, and according to the long established practice, whether the defendant was at large or a prisoner, the plaintiff in all the Courts had until *the end of the second* term inclusive after that in which the writ was returnable, and in or of which the defendant's appearance was entered, or his bail put in, or his detention or render made, (*h*) and the recent statutes or rules do not appear to have intended to compel the plaintiff to declare *sooner* than before; and, therefore, as writs in personal actions now have no return day, and the time for declaring is calculated from the *execution* of the writ by service or arrest, yet it would seem, that as well in the case of an actual prisoner or of a defendant at large, the plaintiff is entitled to a *full* term *after* the service or arrest before a prisoner will be supersedable, or a declaration can be demanded by a defendant, or a non-pros signed; but if a defendant be served with a writ or arrested, or detained or rendered on only a day before a term, then the plaintiff must declare against him before the end of such following term, the same as here-

(*e*) 1 Arch. C. P. [68, 69.]

(*f*) See the rule 2 Dowl. 211, 212. Before this rule, the term of commitment or surrender was to be accounted one, although the defendant was not committed or surrendered till the last day of vacation. Reg. Trin. 2 G. 1, s. K. B., Tidd, 354.

(*g*) And see the course of proceeding and requisite affidavit, 1 T. Chitty's Arch. 220.

(*h*) Tidd, 9th ed. as to prisoners, 354, to 356, and as to defendants at large, id. 420, 422.

tofore was the case if a defendant were rendered on the last day of a vacation.(i) So that if a defendant were served or arrested, or rendered, or detained immediately after the first day of *Hilary* term, or at any time between the first day of that term and the end of the succeeding vacation, the plaintiff would equally be in time if he declared before the end of the following *Easter* term.

12. If no judgment of non-pros signed, then within a year.

Supposing that no judgment of non-pros has been signed, nor an extension of time obtained, then by the express terms of Reg. Gen. H. T. 2 W. 4, r. 35, a plaintiff in all *personal* actions *shall be deemed out of Court*, unless he declares *within one year* after the process is *returnable*,(k) (i. e. now there is no return, after the day of service or arrest); and thereby implying, that according to the ancient practice, extending also to real and mixed actions, that a plaintiff, unless previously non-prossed, may declare within a year; (l) and in an action of quare impedit against several defendants, although the plaintiff has not been able to serve one of them, yet, unless he obtain a rule for further time to declare, he will, after the lapse of a year from the *return day* of the first process, be out of Court as to all the defendants who duly appeared; (m) and, therefore, in an action for a malicious arrest, the declaration necessarily averring that the former action was at an end, it was held, that proof that no declaration in that action had been filed or delivered within a year after the return of the writ, sufficiently established the determination of the suit. (n) The defendant himself also is so far out of Court, that he cannot sign judgment of non-pros for not declaring after the year has expired. (o) The year was computed from the return day of the writ, when writs were returnable at a particular time, and not from the time of the defendant's appearance; (p) and where a writ of quare impedit was returnable on 8th Jan. 1834, a declaration on 10th Jan. 1835, was holden too late, although one of the defendants had not appeared, because the plaintiff should have obtained further time to de-

(i) Reg. Trin. 2 G. 1, in K. B. Tidd, 354.

(k) See the rule, 8 Bing. 293; and prior decisions, Jer. Rules, 51, note (k); Tidd, 421, 499; 3 Barn. & Ald. 272; 5 Taunt. 649; *Cook* v. *Allen*, 3 Tyr. 378; Prior's Prac. 211.

(l) *Barnes* v. *Jackson*, 1 Hodge's Rep. 59; 1 Bing. N. C. 545; 3 Dowl. 404, S. C.

(m) *Barnes* v. *Jackson and others*, 1 Hodge's Rep. 59; 1 Bing. N. C. 545; 3 Dowl. 404.

(n) *Pierce* v. *Street*, 3 Barn. & Adol. 397.

(o) *Cooper* v. *Nias*, 3 Barn. & Ald. 271.

(p) *Id. ibid.*; 1 Bing. N. C. 548.

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clare.(q) It has been suggested that process would now be deemed to be *returnable* within the meaning of this rule requiring the plaintiff to declare within a year afterwards, on the day on which it is served or executed.(r) This rule impliedly extends the time for declaring in Common Pleas and the Exchequer to a *year*, though before that rule a plaintiff must in Common Pleas have declared before the third term,(s) and in the Exchequer before the essoin day of the fourth term.(t) And although proceedings be stayed by rule, plaintiff must declare within the year, or be out of Court.(v)

After an injunction.

A declaration delivered after injunction obtained in a Court of Equity is considered regular *at law* without regard, in a Court of law, to any consequences of disobedience to which the plaintiff may have subjected himself in the Court of Equity, and therefore a rule to set aside a declaration under such circumstances was itself set aside.(u)

13. Of plaintiff's obtaining further time by rule to declare.

If the plaintiff be not ready to declare before the end of the term next after the term or vacation in or of which the defendant entered his appearance, (within which time we have seen it is probable it would be held that he ought regularly to declare;)(x) or if in an action against several, all have not appeared, or one or more has not been served or arrested,(y) or if the plaintiff be doubtful whether it is expedient to proceed any farther in the action, then, provided the defendant *has appeared* in *due time*, so as to be in a situation to sign judgment of non-pros, but not otherwise,(z) the plaintiff should now in all the Courts, on or before the last day of such second term, obtain from the Clerk of the Rules in King's Bench, or from the Secondary in Common Pleas, *a side bar rule for time to declare*

(q) *Barnet* v. *Jackson*, 1 Bing. N. C. 515; 3 Dowl. 404. And yet in such case the defendants who had appeared could not have non-prossed the plaintiff, *Palmer* v. *Feistel and another*, 2 Dowl. 507.

(r) 1 Arch. C. P. [68]; *sed quære*, see 2 Arch. K.B. 4th ed. 893, citing Price's Prac. 283.

(s) 5 Taunt. 649; Tidd, 417, 422.

(t) Tidd, 299.

(u) *Horne* v. *Took*, 2 Dowl. 776.

(v) *Unite* v. *Humphrey and others*, 3 Dowl. 559.

(x) *Ante*, 443, 444; and see 1 Arch. C. P. [68].

(y) *Richardson* v. *Pollitt*, 1 Hodge's Rep. 75.

(z) Reg. Hil. 9 Anne; 13 Car. 2, stat. 2, c. 2, s. 3, which only authorises a defendant to sign judgment of non-pros when he has appeared *in the term wherein* the process is returnable. A defendant cannot sign a non-pros for not declaring, if the plaintiff entered an appearance *for him*. In 2 Arch. K. B. 4th ed. 893, it is suggested, that now the defendant may perhaps be considered entitled to sign judgment of non-pros *on entering his appearance* by the last day of the term in which the plaintiff should have *declared, or even at any time after*, provided the plaintiff had not in the meanwhile entered an appearance for him according to the statute, see Price's Prac. 283. But in 1 Arch. C. P. [68], it is suggested that process would now be deemed to be *returnable* at least within the rule of H. T. 2 W. 4, as to declaring *de bene esse* on the day on which it is served or executed.

until the first day of the ensuing term,(a) or, as is now more frequent, a rule for a *month's* or *even two months' time*, and paying for the same in King Bench, 1s. 6d., or in Common Pleas, 2s. 6d.(b) A copy of this should, to save the expense of a demand of declaration, be immediately served upon the defendant or his attorney;(c) and if at the expiration of that time the plaintiff be still not ready to declare, he may from time to time obtain similar rules for *further time;* and if he declare before the expiration of the time given by any existing rule, a subsequent judgment of non-pros would be irregular.(d) It will be observed, that the rule is only drawn up on the terms of the defendant not being in custody, and therefore it would seem, that unless some special circumstances, and upon a rule to show cause why time could not be obtained in an action against a single defendant, time to declare could not be obtained if he be a prisoner. But we have seen, that in an action against *several* defendants, as the plaintiff cannot declare absolutely against all, in consequence of his not having been able to execute process against one, he *may*,(e) and indeed must,(f) apply for, and obtain by summons an order or rule for further time to declare against the defendant, who is a prisoner, or he will otherwise be supersedable; and if one of several defendants has not been served or arrested, yet unless the plaintiff obtain a rule for time to declare against the others, he would be out of Court as to the other defendants at the end of a year after the return day of the first writ to which they had duly appeared.(g)

(a) In K. B. Reg. Gen. H. T. 2 W. 4, r. 30, expressly orders, "that the plaintiff may have a rule for time to declare in the Court of Exchequer as well as in other Courts," see Jervis's Rules, 52, n. (n), according to which, previous to this rule, the course in the Exchequer was to obtain time to declare by *summons* and *order* of a baron. The form of a rule is thus:—

Form of a rule for *time* to declare.

Tomkins v. Jackson. On the —— day of —— A.D. 1835.
It is ordered, that the plaintiff have time [*or in case of a second or subsequent application*, "further time"] to declare until the first day inclusive of the next term, [*or* "last day inclusive of the present term,"] if the defendant is not in custody.

By the Court.

Side bar. (or in Common Pleas, here say,) "In the Treasury Chamber, at the plaintiff's instance."

(b) 1 Arch. K. B. 4th ed. 219. Two months in *Richardson* v. *Pollen*, 1 Hodge's Rep. 75.

(c) *Towes* v. *Rowel*, 1 H. Bla. 87.

(d) *Gray* v. *Pennell*, 1 Dowl. 120.

(e) Reg. Gen. T. T. 3 W. 4, r. 1; Jer. Rules, 85, 86.

(f) *Morton* v. *Gray and another*, 9 B. & Cress. 544; *Williams* v. *Mainwaring*, Barnes, 401; *Barnes* v. *Jackson and others*, 1 Hodge's Rep. 59; 1 Bing. N. C. 545; 3 Dowl. 404.

(g) *Barnes* v. *Jackson*, 1 Hodge's Rep. 59; 1 Bing. N. C. 545; 3 Dowl. 104, S. C., *ante*, 445, 446; *Richardson* v. *Pollen*, 1 Hodge's Rep. 75.

SECT. V.—PROCEEDINGS BY A DEFENDANT TO COMPEL PLAINTIFF TO DECLARE, OR ENABLE DEFENDANT TO SIGN NON-PROS.

V. Proceedings by a defendant to *compel* the plaintiff to declare and to enable defendant to sign non-pros.

When an action has been *removed* from an inferior Court, the defendant may and must, in order to compel the plaintiff to proceed in the Court above, obtain and serve a rule to declare, and Reg. Gen. Hil. T. 2 W. 4, r. 37, orders, that such rule may be given within four days after the end of the term in which the writ (i. e. of habeas corpus, or re. fa. lo. in replevin, &c. is returned).(*h*) But the following rule expressly orders that it shall not be necessary for a defendant in any case to give a *rule to declare, except upon removals from inferior Courts.*(*i*) Still, however, in order to limit the number of rules extending the time to declare on behalf of the plaintiff, the Reg. Gen. Hil. T. 2 W. 4, r. 39, orders, that the defendant may in all the Courts obtain *a rule to declare peremptorily*, and that the same may be *absolute* in the first instance, and such a rule binds the plaintiff to declare before the end of the term in which such rule is made.(*k*)

1 When no rule to compel declaration necessary.

2. Written demand of declaration, when requisite before non-pros.

However, the Reg. Gen. Trin. T. 1 W. 4, r. 8, orders, that no judgment of non-pros shall be signed for want of a *declaration*, replication, or other subsequent pleading, until *four days* next after *demand* thereof shall have been made *in writing* upon the plaintiff, or his attorney, or agent, as the case may be.(*l*) We have seen that probably the Court would not allow such a

(*h*) See former practice, Jervis's Rules, 53, note (*m*).

(*i*) Reg. Gen. Hil. T. 2 W. 4, r. 38, and Jervis's Rules, 52, note (*o*).

(*k*) Jervis's Rules, 52, note (*o*); see form of such peremptory rule, T. Chitty's Forms, 2d edit. 94, 95.

(*l*) Jervis's Rules, 29, note (*b*). The form of *demand* may be thus:—

3. Form of demand of a declaration.

In the K. B., [*or* "C. P.," *or* "Exch."]

Between { A. B., plaintiff, and C. D., defendant.

The defendant *demands* a declaration in this cause, otherwise judgment of non-pros. Dated this —— day of ——, A.D. 1835.

Yours, &c.

To Mr. E. F., plaintiff's attorney, [*or* "agent."]

G. H., defendant's attorney, [*or* "agent."]

demand to be made until the expiration of the term next after that in which, or the vacation of which, the service or arrest was made, or rather a previous demand would be irregular as premature.(m)

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A defendant's attorney should not, by this or any other means, in any case urge a plaintiff to declare, unless it be certain that the action is not sustainable, for otherwise, as in case of motions for judgment in case of a nonsuit, a defendant's attorney might injudiciously frequently occasion a judgment against his client, which, if he had remained passive, would never have been obtained.

4. Of signing judgment of non-pros. (n)

No defendant can sign judgment of non-pros when he, having himself neglected to appear on or before the eighth day after service of the writ, has suffered the plaintiff to enter an appearance for him, nor in bailable process, where he has neglected to put in bail in eight days after the arrest.(o) And in an action against several defendants a judgment of non-pros cannot be signed until all have appeared.(p) But if the defendant has duly appeared in eight days after service of a writ of summons, or has duly put in bail above in eight days after arrest, then he may after the expiration of the following term deliver a written demand of declaration, and after the expiration of *four days* he may, without any rule to declare except in cases of removal of actions from an inferior Court, sign judgment of non-pros, unless the plaintiff has previously obtained a rule for further time to declare.(q)

If further time should be obtained after such written demand of declaration, the defendant may sign judgment of non-pros without a fresh demand of declaration, in case the plaintiff does not declare within the enlarged time.(r)

Defendant must have duly appeared.

But a defendant cannot in any case sign judgment of non-pros for not declaring after the expiration of a year from the return day, (or, perhaps, now from the day of executing of the process,) (s) unless indeed the plaintiff has obtained further time to declare by rule or express terms, and omits to declare within such extended time; and when writs had a return day, judgment of non-pros must have been signed within a year after

(m) 1 Arch. C. P. 69, *ante*, 443, 444.

(n) See in general Tidd, 9th edit. 459, 460; 2 Arch. K. B. 4th edit. 892.

(o) 1 Arch. C. P. [69]; Arch. K. B. vol. ii. 4th edit. 893; Price's Prac. 283.

(p) *Palmer* v. *Fertel and another*, 2 Dowl. 507.

(q) In Price's Prac. of A.D. 1833, p. 233, it is suggested, that a defendant might sign judgment of non-pros, provided he appeared before the end of second term, in case plaintiff has not previously entered appearance; see 2 Arch. K. B. 4th edit. 893, *sed quære*.

(r) *Wells* v. *Hare*, 1 Dowl. 366.

(s) *Cooper* v. *Nias*, 3 Bar. & Ald. 271; 1 Chitty's Rep. 669, S. C.; Reg. Gen. 2 W. 4, r. 35.

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such return day, and the defendant had not a year from the time of his putting in or justifying bail. (t)

If a declaration *in fact* delivered, judgment of non-pros cannot be signed.

If, in fact, a declaration has been delivered, although by an attorney not competent to act in the Court in which the action is pending, that is no ground for signing judgment of non-pros, but the defendant should move to stay the proceedings until a proper attorney has been appointed. (u)

5. Of setting aside judgment of non pros

If the plaintiff has inadvertently suffered judgment of non pros for not declaring, the Court will in general on motion set it aside on payment of costs, upon an affidavit that *the plaintiff*, at the commencement of the action, had and continues to have a good and just cause, or causes of action, or a right of action on the merits, and it is advisable also, according to the facts, to show indulgence towards the defendant, at his request, pending the action and any express promises, letters, &c. And unless the defendant swear in terms, in answer to the rule, that he has a good defence on the merits, or that he paid the debt, the Court will in general set aside the judgment. (x)

SECT. VI.—OF THE DECLARATION ITSELF.

The *declaration itself* as affected by the recent statutes and rules in general.

We have next to examine the *declaration* itself, but in that attempt we shall only notice those few alterations in *practice* affecting declarations, which have either expressly or impliedly been introduced by the *recent statutes and rules of Court* in the present reign; and it will be found that they leave *untouched the* prior established *principles* which I have attempted to collect in a previous publication, (y) and (with the exception of the *new forms of commencements* and *more concise forms of counts on bills of exchange, promissory notes*, and *indebitatus counts*, and that upon *an account stated*, and the total omission of the quantum meruit and quantum valebant counts, and the avoidance of repetition of *venue* or *place*, and a few other very small alterations), *the substance of each entire count will continue the same as heretofore, and as in the precedents con-*

(t) Cooper v. Nias, 3 Bar. & Ald. 271; 1 Chitty's Rep. 669; Tidd, 459; Dax, 80.

(u) *Bayley* v. *Thompson*, 2 Dowl. 655.

(x) *Cortesois* v. *Hume*, 2 Dowl. 134. There is an indistinctness in the report of Lord Lyndhurst's observation, and the word *now* seems a misprint for *not*.

(y) See Chitty on Pleading, 5th edit. three volumes, and see the 6th edition, more particularly adapted for the use of students and practitioners.

tained in the work alluded to. And it will be found to be *a general rule that the nonobservance of these new rules, or of the forms thereby introduced,* do not constitute a defect *in pleading* that could be taken advantage of by *a demurrer,* but would be merely an *irregularity* to be objected to by summons or motion to the Court, as will be established by the decisions that the variance in the commencement of or in the body of the declaration of the *form of action* varying from the writ,(z) or the improper introduction in the body of the declaration of a venue,(a) are not grounds of *demurrer,* but merely of application to a judge or the Court. Pleaders, however, should not only observe the alterations *expressly* prescribed, but also in future adopt, on all occasions, *a more concise mode of describing facts,* so that, upon the whole, pleadings properly framed will be *more concise* than of late they have been. One general observation affecting all declarations in mere personal actions may here be made, viz. that in consequence of the uniformity of process act, 2 W. 4, c. 39, having abolished *all prior process* in personal actions, and prescribed new forms of writs, it has become necessary not only in the commencement but in *the body of* each count to abandon the *previous names and descriptions of process,* and accurately to describe *the new writs* either by *name* or in *substance* according to their very terms; and, therefore, the statement in a declaration in scire facias on a recognizance of bail, that the action had been commenced *by bill* (instead of stating *by writ,* or by scire facias,) was holden irregular and open to a special demurrer, although not to a general demurrer or a writ of error.(b)

The following is a chronological statement of the recent rules and enactments affecting declarations:—

First, Chronological statement of the recent statutes and rules affecting the form of declarations.

First.—Chronological Statement of the recent Statutes and Rules affecting Declarations, &c.

(z) *Marshall* v. *Thomas,* 9 Bing. 678; 3 Moore & Scott, 98, S. C., *post.*

(a) There is, however, an express exception in trespass quare clausum fregit, for if the declaration do not state the name of the close or abuttals there may be a special demurrer.

(b) *Darling* v. *Gurney,* 2 Dowl. 235, overruling prior decision in same case in 2 Dowl. 101; and 2 Cromp. & M. 226, S. C.; and see *Peacock* v. *Day,* vol. iii. 291.

CHAP. XV. Of the Declaration itself.

Reg. Gen. Trin. T. 1 W. 4, limiting the length and prescribing the forms of declarations on bills of exchange, promissory notes, common counts, account stated, and general conclusion.

The first modern step towards improvement will be found in the Reg. Gen. of Trin. T. 1 W. 4, which was promulgated by all the judges, under the assumption that the 11 G. 4 and 1 W. 4, c. 70, s. 11, empowered them to make rules affecting *pleadings* as well as practice. The rules and orders are as follows.

"Whereas declarations in actions upon bills of exchange, "promissory notes, and the counts usually called the common "counts, occasion unnecessary expense to parties by reason of "their length, and the same may be drawn in a more concise "form: Now for the prevention of such expense, it is or- "dered, that if any declaration in *assumpsit*, hereafter filed or

" delivered, and to which the plaintiff shall not be entitled to a " plea as of this term, being for any of the demands mentioned " in the schedule of forms and directions annexed to this order, " or demands of a like nature, shall exceed, in length such of " the said forms set forth or directed in the said schedule, as " may be applicable to the case, or if any declaration in debt " to be so filed or delivered for similar causes of action, and " for which the action of *assumpsit* would lie, shall exceed " such length, no costs of the excess shall be allowed to the " plaintiff if he succeeds in the cause, and such costs of the " excess as have been incurred by the defendant shall be, " taxed and allowed to the defendant, and be deducted from " the costs allowed to the plaintiff; and it is further ordered, " that on the taxation of costs, as between attorney and client, " no costs shall be allowed to the attorney in respect of any " such excess of length, and in case any costs shall be payable " by the plaintiff to the defendant, on account of such excess, " the amount thereof shall be deducted from the amount of " the attorney's bill." The rule then prescribes the forms *of the counts* on bills of exchange, promissory notes, and of the common counts for goods, work, money lent, money paid, money had and received, and on an account stated, with the *common conclusion*, and concludes by recommending that counts on bills and notes be placed first in the declaration, and that the common conclusion shall apply to them also. These forms, as well in assumpsit as in debt, are still to be observed, with the exception that since Reg. Gen. Hil. T. 4 W. 4, reg. 8, all the statements of *venue in the body* of each count are to be omitted.

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The next improvement was introduced by Reg. Gen. Hil. Term, 2 W. 4, Reg. I. rule 40, ordering that " a declaration, " laying the venue in a different county from that mentioned in " the process, shall not be deemed a waiver of the bail." But that rule only applied to actions in the King's Bench *by original writ*, now abolished by 2 W. 4, c. 39.(c)

2. Reg. Gen. Hil. T. 2 W. 4, rule 40, that every venue or declaration, different to that in writ, shall not discharge the bail.

The Reg. Gen. r. 4, of the same term, also ordered, that the rules heretofore made in the Courts of King's Bench and Common Pleas respectively, *for avoiding long and unnecessary repetitions of the original writ in certain actions* therein mentioned, " shall be extended and applied in the Courts of King's

3. Reg. Gen. Hil. T. 2 W. 4, r. 4, prohibiting long recital of original writs in declaration.

(c) Jervis's Rules, 53, note (p).

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"Bench and Common Pleas, and Exchequer of Pleas, to all "*personal* and *mixed actions*, (*d*) and that in none of such "actions shall the original writ be repeated in the declaration, (*d*) but only the nature of the action stated in manner "following, viz. 'A. B. was attached to answer C. D. in a plea "'of trespass,' [or 'in a plea of trespass in ejectment,' or as "the case may be,] and any further statement shall not be al-"lowed in costs." This rule still applies to and in effect shortens declarations in *ejectment* in the Courts of King's Bench and Common Pleas; but as the uniformity of process act, 2 W. 4, c. 39, abolished the proceeding by original writ in *personal* actions, the utility of this last rule has now in a great measure been superseded.

4. Reg. Gen. Mich T. 3 W 4, reg. 15, prescribing forms of *commencing* a declaration.

The uniformity of process act, 2 W. 4, c. 39, having abolished all the prior writs, and introduced others in lieu, it became expedient, in order to secure uniformity in declaring, for the judges to prescribe *new forms of commencing declarations*, and therefore the rule Mich. T. 3 W. 4, I. r. 15, was promulgated as follows: "It is further ordered, that *every declara-"tion* shall in future be *intituled in the proper Court*, and *of "the day of the month and year* on which it is filed or deli-"vered, and shall commence as follows."

Declarations to be *entitled* of the proper Court and of the very day of filing or delivering declaration.

Declaration after Summons.

Form of commencement of declaration on a writ of summons.

"[*Venue.*] A. B. by E. F. his attorney [*or* 'in his own pro-"'per person'] complains of C. D. who has been *summoned* to "answer the said A. B. &c."

Declaration after Arrest, where the Party is not in Custody.

Do. on a capias.

"[*Venue.*] A. B. by E. F. his attorney [*or* 'in his own pro-"'per person'] complains of C. D. who has been *arrested* at "the suit of the said A. B. &c."

Declaration where the Party is in Custody.

Do. on a writ of detainer.

"[*Venue.*] A. B. by E. F. his attorney [*or* 'in his own pro-"'per person'] complains of C. D. being detained at the suit "of A. B. in the custody of the sheriff [*or* 'the Marshal of the "'Marshalsea of the Court of King's Bench,' *or* the 'Warden "'of the Fleet.']"

(*d*) Including therefore declarations in *ejectment*, and therefore it would be irregular to recite the supposed writ in such declaration; see the proper forms of declarations in ejectment, Chitty on Pleading, 6th edit. vol. ii.

Declaration after the Arrest of one or more Defendant or Defendants, and where one or more other Defendant or Defendants shall have been served only and not arrested.

" [*Venue.*] A. B. by E. F. his attorney [*or* 'in his own proper " person'] complains of C. D. who has been arrested at the " suit of the said A. B. [*or* 'being detained at the suit of the " 'said A. B.' *&c. as before*] and of G. H. who has been served " with a writ of capias to answer the said A. B. &c."

Do. against several defendants, one *arrested* or *detained*, and the other *served* with a copy of capias.

" And that the entry of pledges to prosecute, at the con" clusion of the declaration, shall in future be discontinued."

Pledges at conclusion to be omitted.

Under the authority of 3 & 4 W. 4, c. 42, s. 1, which enabled the judges to promulgate rules affecting pleadings, several very important rules relating to declarations and pleadings were promulgated in Hil. Term, 4 W. 4, viz. by Reg. 1, " *Every* " *pleading*, as well as the declaration, (*e*) shall be *intituled* of " the day of the month and year *when the same was pleaded*, " and shall bear no other time or date, and every declaration " and other pleading shall also be entered on the record made " up for trial, and on the judgment roll, under the date of the " day of the month and year when the same respectively took " place, and without reference to any other time or date, unless " otherwise specially ordered by the Court or a judge."

5. Reg. Gen. Hil. T. 4 W. 4, reg. 1. All pleadings to be *intituled* of the day when pleaded, and shall be entered on record accordingly, unless otherwise ordered.

Reg. 5 *recites* thus: " And whereas by the mode of plead" ing hereinafter prescribed, the several disputed facts mate" rial to the merits of the case will, before the trial, be brought " to the notice of the respective parties more distinctly than " heretofore, and by the said act of the 3 & 4 W. 4, c. 42, " s. 23, the powers of amendment at the trial in cases of va" riance in particulars not material to the merits of the case, " are greatly enlarged." And then the rule *orders* that " *Seve*" *ral counts shall not be allowed*, unless a *distinct subject*" *matter of complaint* is intended to be established in respect " of each; nor shall *several pleas*, or avowries, or cognizances " be allowed, *unless a distinct ground of answer or defence* is " intended to be established in respect of each.

6. Reg. Gen. Hil. T. 4 W. 4, reg. 5.

Prohibiting more that one count or plea, unless there be actually two distinct subject-matters of complaint, or two distinct grounds of defence.

" Therefore counts founded on one and the *same principal* " *matter of complaint*, but varied in statement, description, or " circumstances only, are not to be allowed.

" Ex. gr. Counts, founded upon the same contract, described

Illustrative in-

(*e*) See the prior rule as to declarations, *ante*, 454.

"in one as a contract without a condition, and in another as "a contract with a condition, are not to be allowed, for they "are founded on the same subject-matter of complaint, and are "only variations in the statement of one and the same contract.

"So counts for not giving, or delivering, or accepting a bill "of exchange in payment, according to the contract of sale for "goods sold and delivered, and for the price of the same "goods to be paid in money, are not to be allowed.

"So counts for not accepting and paying for goods sold, "and for the price of the same goods, as goods bargained and "sold, are not to be allowed.

"But counts upon a bill of exchange or promissory note, "and for the consideration of the bill or note in goods, money, "or otherwise, are to be considered as founded on distinct "subject-matters of complaint; for the debt and security are "different contracts, and such counts are to be allowed.

"Two counts upon the same policy of insurance are not to "be allowed.

"But a count upon a policy of insurance, and a count for "money had and received, to recover back the premium upon "a contract implied by law, are to be allowed.

"Two counts on the same charter-party are not to be al- "lowed.

"But a count for freight upon a charter-party, and for "freight pro rata itineris, upon a contract implied by law, are "to be allowed.

"Counts upon a demise, and for use and occupation of the "same land for the same time, are not to be allowed.

"In actions of tort for misfeazance, several counts for the "same injury, varying the description of it, are not to be "allowed.

"In the like actions for nonfeazance, several counts, founded "on varied statements of the same duty, are not to be allowed.

"Several counts in trespass, for acts committed at the same "time and place, are not to be allowed.

Indebitatus counts.

"Where several debts are alleged in *indebitatus assumpsit* "to be due in respect of several matters, ex. gr. for wages, work "and labour as a hired servant, work and labour generally, "goods sold and delivered, goods bargained and sold, money "lent, money paid, money had and received, and the like, *the* "*statement of each debt is to be considered as amounting to a* "*several count, within the meaning of the rule* which forbids "the use of several counts, though one promise to pay only is "alleged in consideration of all the debts.

"Provided that a count for money due on *an account stated* "may be joined with any other count for a money demand, "though it may not be intended to establish a distinct subject-"matter of complaint in respect of each of such counts.

Account stated allowed to be added.

"The rule which forbids the use of several counts is not to "be considered as precluding the plaintiff from alleging *more* "*breaches* than one of the same contract in the same count.

Several breaches admissible.

"*Pleas, avowries,* and *cognizances,* founded on one and the "same principal matter, but varied in statement, description, "or circumstances only, (and pleas in bar in replevin are within "the rule,) are not to be allowed.

Instances by way of illustration when or not *several pleas* shall be admissible.

"Ex. gr. Pleas of solvit ad diem, and of solvit post diem, "are both pleas of payment varied in the circumstances of time "only, and are not to be allowed.

"But pleas of payment, and of accord and satisfaction, or of "release, are distinct, and are to be allowed.

"Pleas of an agreement to accept the security of A. B. in "discharge of the plaintiff's demand, and of an agreement to "accept the security of C. D. for the like purpose, are also "distinct, and to be allowed.

"But pleas of an agreement to accept the security of a third "person in discharge of the plaintiff's demand, and of the "same agreement, describing it to be an agreement to for-"bear for a time, in consideration of the same security, are not "distinct, for they are only variations in the statement of one "and the same agreement, whether more or less extensive, in "consideration of the same security, and not to be allowed.

"In trespass quare clausum fregit, pleas of soil and freehold "of the defendant in the locus in quo, and of the defendant's "right to an easement there, pleas of right of way, of common "of pasture, of common of turbary, and of common of estovers, "are distinct, and are to be allowed.

"But pleas of right of common at all times of the year, and "of such right at particular times, or in a qualified manner, are "not to be allowed.

"So pleas of a right of way over the locus in quo, varying "the termini or the purposes, are not to be allowed.

"Avowries for distress for rent, and for distress for damage "feasant, are to be allowed.

"But avowries for distress for rent, varying the amount of "rent reserved, or the times at which the rent is payable, are "not to be allowed."

The *examples* not to limit the *principle* of the rules.

The *examples* in this and other places specified are given as some *instances only* of the application of the rules to which

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they relate, but the *principles* contained in the rules are not to be considered as restricted by the examples specified.

7. Reg. Gen. Hil. T. 4 W. 4, rule 6. If rule 5 be violated the opponent may obtain *a judge's order for striking out a second count or plea* with costs, unless, &c.

In order to enforce this fifth rule, reg. 6 orders as follows:— "Where more than one count, plea, avowry, or cognizance, "shall have been used in apparent violation of the preceding "rule, the opposite party shall be at liberty to apply to a *judge*, "suggesting that two or more of the counts, pleas, avowries, or "cognizances, are founded on the same *subject-matter of com-"plaint*, or *ground of answer or defence*, for an order that *all the "counts, pleas*, avowries, or cognizances introduced in violation of "the rule be struck out *at the cost of the party pleading*; (*f*) "whereupon the judge *shall* order accordingly, unless he shall "*be satisfied upon cause shown, that some distinct subject-"matter of complaint* is bonâ fide intended to be established "in respect of each of such counts, or *some distinct ground of "answer or defence* in respect of each of such pleas, avowries, "or recognizances, in which case he shall *indorse* upon the "summons, or state in his order, as the case may be, that he is "so satisfied; and shall also specify the counts, pleas, avowries, "or cognizances mentioned in such application, which shall be "allowed."

8 Reg. Gen. Hil. T. 4 W. 4, rule 7. The party who has pleaded several counts or pleas, and fails in proving a distinct matter in support of each, shall pay the opponent's costs, and if the party shall not bonâ fide retain a second count under pretence that he could prove a distinct cause of action or ground of defence, and fail in establishing the same, and the judge who

In order still more effectually to enforce the 5th rule, the 7th rule orders that "Upon *the trial*, where there is more than "one count, plea, avowry, or cognizance upon the record, and "the party pleading fails to establish a distinct subject-matter "of complaint in respect of each count, or some distinct ground "of answer or defence in respect of each plea, avowry, or cog-"nizance, a verdict and judgment shall pass against him upon "each count, plea, avowry, or cognizance, which he shall "have so failed to establish, and he shall be liable to the other "party for all the costs occasioned by such count, plea, avowry, "or cognizance, including those of the *evidence* as well as those "of the pleadings: (*g*) and further, in all cases in which an ap-"plication to a judge has been made under the preceding rule, "and any count, plea, avowry, or cognizance, allowed as afore-"said upon the ground that some distinct subject-matter of "complaint was *bonâ fide* intended to be established at the

(*f*) See *post* as to applications under this rule to strike out counts. It could scarcely have been anticipated that the mere introduction of venue in the body of a declaration or of a count thus, "And also in the sum of £——, for work and labour and materials found," should, in case of a judge's order to strike out such count, occasion to the plaintiff an expense of upwards of 4*l*.

(*g*) This part of this rule is the same in effect as Reg. Gen. Hil. T. 4 W. 4, r. 74, *post*, 476, 477.

"trial in respect of each count so allowed, or some distinct "ground of answer or defence in respect of each plea, avowry, "or cognizance, so allowed, if the Court or judge before whom "the trial is had shall be of opinion that no such distinct sub- "ject-matter of complaint *was bonâ fide intended to be esta- "blished* in respect of each count so allowed, or no such distinct "ground of answer or defence in respect of each plea, avowry, "or cognizance, so allowed, and shall *so certify* before final "judgment; such party so pleading shall not recover any costs "upon the issue or issues upon which he succeeds arising out "of any count, plea, avowry, or cognizance, with respect to, "which the judge shall so certify."

shall try the cause shall *so certify*; then the party so improperly pleading shall lose the costs of the issues upon which he succeeds.

Reg. 8. orders—"The *name of* a county shall in all cases be "stated in the margin of a declaration, and shall be taken to be "the venue intended by the plaintiff, and no venue shall be "stated in the body of the declaration, or in any subsequent "pleading: Provided, that in cases where local description is "now required, such local description shall be given."

9. Reg. Gen. Hil. T. 4 W. 4, r. 8, ordering, when *venue* in margin shall suffice.

Reg. 20. orders—"In all cases under the 3 & 4 W. 4, c. 42, "s. 10, in which, after a plea in abatement of the nonjoinder "of another person, the plaintiff shall, without having proceed- "ed to trial on an issue thereon, *commence another action* "against the defendant or defendants in the action in which "such plea in abatement shall have been pleaded, and the per- "son or persons named in such plea in abatement as joint con- "tractors, the *commencement of the declaration shall be* in "the following form:—

10. Reg. Gen. Hil. T. 4 W. 4, r. 20, prescribing form of commencement of Declaration in fresh action after a plea of nonjoinder.

"[*Venue.*] A. B, by E. F. his attorney, [*or*, 'in his own "proper person,' &c.] complains of C. D. and G. H., who "have been summoned to answer the said A. B., and which "said C. D. has heretofore pleaded in abatement the non- "joinder of the said G. H." &c. [The same form to be used mutatis mutandis in cases of arrest or detainer.]

The prescribed form of Declaring in a second action after a plea in abatement.

Then the same general rule of Hil. T. 4 W. 4, reg. 4, prescribes rules relative to pleadings in particular actions, and as regards *declarations*, as follows:—Reg. 4. "In actions on "*policies of assurance, the interest* of the assured may be "averred thus: 'That A. B. C. and D. or some or one of them, "'were or was interested,' &c. And it may also be averred "'That the insurance was made for the use and benefit and on "'the account of the person or persons so interested.' Before

11. Reg. Gen. Hil. T. 4 W. 4, reg. 4. Statement in a Declaration on a policy of assurance of the *interest in several persons or some of them*, in the alternative.

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this rule, such mode of averring the interest in several persons, or some of them, in the *alternative*, would have been demurrable.

12. Reg. Gen. Hil. T. 4 W. 4, name or abuttals must be stated when. (g)

In Trespass.—"In actions of *trespass quare clausum fregit* "the close or place in which, &c. must be designated in the "declaration by name or abuttals, or other description, in "failure whereof the defendant may demur specially." (g)

13. Alteration in form of Declaration by *Statute* 3 & 4 W. 4, c. 42, s. 12, as to *initials*.

There is one express regulation respecting the forms of declarations introduced by *statute* 3 & 4 W. 4, c. 42, s. 12, which enables a plaintiff in an action upon any written instrument to designate any party to it by the same *initial letter* or letters *or contraction* of the christian or first name or names *in such instrument*, instead of stating the christian or first name or names in full.

14 *Analytical summary* of the several recent alterations in Declarations.

The alterations introduced by these *recent rules* and *enactments*, as they affect the *forms* and *requisites* of *Declarations*, may be thus analyzed and abbreviated: in all other respects the preceding principles, rules, and forms, are to be strictly observed.

1. Declarations must be *intituled* in the particular Court; as thus: "In the King's Bench," "In the Common Pleas," "In the Exchequer of Pleas," and in K. B., not, as before, in the name of the chief clerk. Reg. Gen. Mich. T. 3 W. 4, r. 15, *ante*, 454.

2. Must *be intituled* of the particular day on which they are actually delivered or filed; as thus: "On the —— day of —— A.D. 1835." (h)

3. The *Venue* is to be stated in the *margin*, as heretofore, but is *not* to be stated in the *body* of the declaration, or the statement may be struck out on summons, but is not cause of demurrer. But in *trespass quare clausum fregit* the close must be designated by name or abuttals, or the defendant may demur *specially*. Reg. Gen. Hil. T. 4 W. 4, *supra*.

4. The *Commencement* should be in one of the newly-prescribed concise forms, or the declaration may be set aside as irregular, though not demurred to on that ground. Reg. Gen. Mich. T. 3 W. 4, reg. 15, *ante*, 454, 455.

5. On written instruments, when the *first name is written by*

(g) As to the mode of describing by abuttals, see Chitty on Pleading, vol. ii. Index—Abuttals. In *Lemprière* v. *Humphrey*, 1 Harr. & Woll. 170, it appears to have been considered incorrect to describe a close as abutting *towards*, &c.

(h) Reg. Gen. Mich. T. 3 W. 4, r. 15, and Reg. Gen. Hil. T. 4 W. reg. I. *ante*, 454, 455.

initial or contraction, the declaration may describe the party accordingly. 3 & 4 W. 4, c. 42, s. 12, *ante*, 460.

6. The declaration should *correspond with the process* as to the *number* of the defendants, or at least the plaintiff must abandon all proceedings against any other defendant or defendants then declared against. Reg. Gen. Mich. T. 3 W. 4, r. I. *ante*, vol. iii. 183 to 185.

7. If a prior action has been defeated by *plea in abatement of nonjoinder*, the form of *commencing* the declaration in a second action is prescribed by Reg. Gen. Hil. T. 4 W. 4, r. 20, *ante*, 459.

8. The cause of action must be stated in *only one count*, and cannot be varied in *several*; and if a violation of that rule be persisted in to trial, the party may be punished not only by payment of costs on the counts found for the defendant, but also with loss of the costs of the issue *relative to the same matter*, although found in his favour. But *several breaches* of the same contract may still be assigned. Reg. Gen. Hil. T. 4 W. 4, r. 5.

9. The same form of *conclusion* of a declaration in a personal action is to be observed in all the courts, viz. "To the damage of plaintiff of £——, and therefore he brings his suit, &c.," except in penal actions, when the *ad damnum* is to be omitted.(*i*)

10. The statement of *Pledges to Prosecute* is to be discontinued. Reg. Gen. Mich. T. 3 W. 4, reg. 15, and *ante*, 455.

In general the non-observance of either of the preceding *rules*, although relating to and affecting the forms of *pleading*, *cannot* (except in the instance of the statement of abuttals) be taken advantage of by *demurrer* as a *defect* in *pleading*; but must, if at all, be objected to by a *summons and order* of a judge, to set aside the *proceeding for irregularity*.(*k*) Thus, although the above rules expressly require a declaration to be intituled of the day and month when it is delivered, yet it has been decided that the omission of such date is not a ground of demurrer; (*l*) and although the statute, 2 W. 4, c. 39, requires that the form of action shall be expressed in the writ, and it seems that the declaration should accord, yet if it vary, such variance is not a ground of *demurrer*, (partly so because a *writ* cannot now appear on the *face of the pleadings or record*),

11. *Consequences of deviations from such rules, viz. that they are only irregularities and not grounds of demurrer.*

(*i*) See the form of conclusion at end of forms in Reg. Gen. Trin. T. 1 W. 4.

(*k*) And see per Tindal, C. J. in *Anderson v. Thomas*, 9 Bing. 678

(*l*) *Neal v. Richardson*, 2 Dowl 89.

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and it can only be objected to by summons or motion for irregularity to set aside the declaration on account of such deviation.(*m*) So, if the commencement of a declaration, at the suit of an executor, be improperly in the debet and detinet, instead of more properly the latter only, the objection is not a ground of demurrer as part of the declaration, but may be rejected as surplusage.(*n*) So the improper insertion or repetition of the venue in the body of a declaration, contrary to the above rule, Hil. T. 4 W. 4, r. 8, is not a ground of *demurrer*, but merely of a summons to strike out the objectionable repetition;(*o*) and although it is absurd for any practitioner to neglect strict observance with either of these recent rules, yet it is obvious that it could never have been the intention of the judges that the unnecessary insertion in the *body* of a declaration of a venue should be constantly the subject of a summons to strike out these words, which occasions much more expense, and is infinitely more vexatious than the introduction of those few words.(*p*)

Secondly, Practical summary, and observations on the parts and structure of a declaration as altered or affected by the recent statutes and rules.

It may be of practical utility to subdivide and arrange the new regulations, and the decisions thereon, in natural order, as they at present affect the form, and relate to the declaration. The following analysis will show the order of the arrangement:—

(*m*) *Thompson* v. *Dicas*, 2 Dowl. 93; *Scrivener* v. *Watling*, 1 Harrison, 8; *Ward* v. *Tennison*, 1 Adol. & El. 619; *Edwards* v. *Dignam*, 2 Cr. & M. 346; 2 Dowl. 240, S. C. *ante*, vol. iii. 197; and see *Marshall* v. *Thomas*, 3 Moore & S. 98; and *Anderson* v. *Thomas*, 9 Bing. 678; Tidd, Supp. A. D. 1833, p. 122.

(*n*) *Collett* v. *Collett*, 3 Dowl. 211.

(*o*) *Farmer* v. *Champneys*, 1 Crom. M. & Ros. 369; 2 Dowl. 680, S. C.; *Fisher* v. *Snow*, 3 Dowl. 27; *Townsend* v. *Gurney*, *id.* 29.

(*p*) Per Cur. in *Brindley* v. *Bennett*, 2 Bing. 184; see *post*, "*of striking out counts.*"

CHAP. XV. OF THE DECLARATION ITSELF

First, Parts in particular. 1. Title of the court.

1st. Title of Court.—With respect to the first, viz. the Title of Court, formerly, when the proceedings were by *bill*, the name of the prothonotary or chief clerk for enrolling pleas in civil causes, as "Ellenborough," was inserted; and when the proceedings were by *original*, and in all cases in the Common Pleas and in the Exchequer of Pleas, the name of the Court was superscribed. By the above rule, Hil. T. 4 W. 4, r. 15, now *in all cases* the name of the court, as "In the King's Bench," "In the Common Pleas," or "In the Exchequer of Pleas," is to be inserted.

2. Title of declaration as to time of filing or delivery.

2ndly. By Title as to Time.—Formerly, there were some minute distinctions relative to the title of the declaration, then always of some term, and either *generally* relating to the first day of the term, or *specially* of a particular day in such term. But now, in order to expedite the proceedings in a *personal* action, the declaration may be delivered or filed at any time even in vacation, (excepting between the 10th day of August and the 24th day of October, in the long vacation, during which excepted time it would be irregular to declare;) (*q*) and by the above rules of Mich. T. 3 W. 4, r. 15, and Hil. T. 4 W. 4, r. 1, the declaration in *personal* actions is to be intituled of the day of the month and year when the same is filed or delivered. But those rules do not extend to real actions or *quare impedit*, (*r*) or actions of scire facias or ejectment, (*s*) nor to a declaration after a removal from an inferior court, as replevin, or after a removal by habeas, &c.

We have just seen that the neglect to intitule the declaration on the proper day, month, and year, is probably no ground of demurrer, but at most of summons to set aside the declaration for irregularity, (*t*) or of a summons to compel the plaintiff

(*q*) 2 W. 4, c. 39, s. 11, "Provided also that no declaration or pleading shall be filed or delivered between 10th August and 24th October."

(*r*) *Miller* v. *Miller*, 1 Hodge's Rep. C. P. 31, *Barnes* v. *Jackson*, id. 59.

(*s*) *Doe* dem. *Fry* v. *Roe*, 3 M. & Scott, 370; Atherton, 8, *Doe* dem *Gillett* v. *Roe*, 3 M. & Scott, 376, 1 Cr. M. & Ros. 19; 4 Tyr. S. C., 1 Bing. N. C. 253, and see 1 Dowl. 4.

(*t*) *Neal* v. *Richardson*, 2 Dowl. 89, that it would be an irregularity, and perhaps a judgment for want of a plea set

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to insert the correct date of the delivery or filing of the declation.(u) It is to be observed, that the rule of Court of Hil. T. 4 W. 4, No. 1, also not only requires the *issue* to state the *date* of the declaration, but also the actual date of the *first writ*. Care, however, should be observed in the *body* of the declaration to state that the cause of action accrued on a day before that of which the declaration is intituled, and also before the date of the *first writ;* which we have seen is now in all cases to be considered the commencement of the action, and not, as heretofore, when the proceedings were by bill or latitat, as mere process to bring the defendant into Court;(x) for otherwise perhaps a special demurrer, or motion in arrest of judgment, or writ of error on a judgment by default, might be sustainable. However, in a recent case, where the record in an action for verbal slander stated that the writ was issued on the 4th of June, and that the words were spoken on the 24th of June, it was held that this discrepancy on the record was no ground *after verdict* for arresting the judgment.(y) A declaration however need not in the top title, or in the commencement, or elsewhere, (as required in an issue,) state or show the time when the writ was issued; and a rule to set aside the declaration, on account of the omission of the statement of the date of the writ, was therefore refued.(z) Indeed any notice in the declaration of the date of the writ would be redundant; inasmuch as the defendant must already have had notice thereof by the delivery to him of a copy thereof.

3. The venue in margin, (a) and local descriptions in body.

3. *The Venue in Margin.*—The Rule 15 of Mich. T. 3 W. 4, prescribes that all declarations in personal actions shall commence in the forms then given. In these a blank is left for the venue, and there has been no substantial alteration as regards such venue from the previous law. But we have just seen that the general rule Hil. Term, 4 W. 4, r. 8, declares that the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the *venue* intended by the plaintiff, and that no venue shall be stated in the *body* of the declaration, or in *any subsequent* pleading. Provided that

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aside for the omission. See *Topping* v. *Fuge*, 1 Marsh. 341, 344; 5 Taunt. 330, 771, S. C.; *Rowles* v. *Lawrence*, 11 Moore, 338.

(u) *Semble*, *Wilkes* v. *Halifax*, 2 Wils. 256; *Thompson* v. *Marshall*, 1 Wils. 304.

(x) *Ante*, vol. iii. 159; *Rees* v. *Morgan*, 3 Nev. & Man. 205.

(y) *Steward* v. *Layton*, 3 Dowl. 430.

(z) *Du Pre* v. *Langridge*, 2 Dowl. 584.

(a) As to the privilege of an attorney to lay and retain venue in Middlesex, and his waiver of that privilege by employing another attorney to sue for him, *Harrington* v. *Page*, 2 Dowl. 164.

in cases where local description was at the time of making such rules required, such local description shall be given, and which, as regards the descriptions of the name of a *close* or *abuttals* in an action of trespass, will be presently noticed. We have just seen that if, contrary to the rule, the venue should be repeated in the body of the declaration, it is not a ground of demurrer, but at most merely of a summons to strike out the useless allegation. (*b*) It seems, however, still to be considered, that if a venue be inserted in the *body* of a declaration in ejectment it may aid a defective or improper venue in the margin. (*c*) We have seen that whilst original writs were in force, the rule of Hil. T. 2 W. 4, r. I. prescribed that the bail should not be discharged by the plaintiff's laying the venue in a declaration differently to that in the writ, (*d*) and now in all cases the venue may be laid in the margin of a declaration in any county when the venue is transitory, without regard to the county in which the process was issued, or the defendant was arrested.

The 3 & 4 W. 4, c. 42, sect. 22, enables the Court, even in local actions, to direct the *trial* to take place in another county; and it has been held, that if the venue has been laid or changed by consent into a different county to that where the cause of action accrued, neither party can afterwards object that the venue was improperly laid, or that the trial took place out of that county, on account of the defendant, as a justice or public officer, having been privileged to have the cause tried there. (*e*)

4. *The Commencement.*—It may be inferred that the learned judges promulgated the forms of the *commencements* of a declaration antecedent to the body or substance of the complaint, in consequence of the abolition of the writs in use prior to 2 W. 4, c. 39, which occasioned such great variety in the commencements descriptive of the mode in which the defendant had been summoned or brought into Court, (*f*) and in consequence of the new writs thereby introduced, and to *assist* and relieve suitors from any doubts on the proper forms to be adopted, and not on account of any supposed importance in such forms, and therefore they should be *liberally* and not strictly construed. 4. The commencement of declaration.

The prescribed commencements accurately describe the

(*b*) *Ante*, 462.

(*c*) *Doe* v. *Roe*, 3 Dowl. 323; 9 Legal Obs. 301, and see 1 Chitty on Pleading, 5 ed. 305.

(*d*) *Ante*, 453.

(*e*) *Furnival* v. *Stringer*, 1 Bing. N. C. 68.

(*f*) See the great variety, 2 Chitty on Pleading, 5 ed., and see the present forms, with every variation as respects parties, &c. id. 6th edit.

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effect of the process against the defendant; as that he had been *summoned* when he had been served with a writ of summons, or appeared to a distringas founded thereon, or that he had been *arrested* in case of a capias, or *detained* when still a prisoner. (*g*) The former allegations in K. B., that the defendant is in the custody of the marshal, or in C.P. that he had been attached, or in the Exchequer that the plaintiff was debtor to the king, (which in general were *mere fictions*,) would now be untechnical and irregular; (*h*) and in one case, since the uniformity of process act, 2 W. 4, c. 39, and rules thereon of Mich. T. 3 W. 4, r. 15, the statement in the commencement, that the plaintiff was a debtor to the king, was even holden *demurrable*. (*i*) But it seems that the statement in the commencement of a declaration, that the defendant was *summoned* or *arrested*, or is *detained*, if incorrect, in fact could at most be treated as *irregular*, and could not be traversed by plea, (*k*) nor would now be ground of demurrer; (*l*) and in one case, where the commencement incorrectly described the plaintiff as a debtor to the king, though the proceedings had been by writ of summons since the uniformity of process act, the Court desired that an application should be made to the plaintiff's attorney to strike out the improper allegation, and refused a rule upon such application, until it had been shown that the plaintiff's attorney had refused to amend. (*m*)

Of the statement in commencement of declaration of parties, and their names

We have seen that the declaration should strictly *correspond with the process* as regards the *number of parties*, as well plaintiffs as defendants, and in their *exact names*, and that now even upon serviceable process against several defendants, the plaintiff cannot deliver *several* declarations separately against each, though he may deliver one declaration against one or more, provided he drop all proceedings against the other named defendants, though if the plaintiff should declare against each separately, the declaration might be set aside for irregularity. (*n*) The 3 & 4 W. 4, c. 42, sect. 12, authorises a declaration upon a bill of exchange, promissory note, or other *written instrument*, to designate the party by the same *initial* letter or letters, or *contraction* of the Christian or *first* name therein written, in-

(*g*) *Barrett* v. *Harris*, 2 Dowl. 186.

(*h*) *Hart* v. *Dally*, 2 Dowl. 257.

(*i*) *Hirst* v. *Flit*, 3 Tyr. 264; but semble being only in the commencement, the irregularity was not properly the subject of demurrer, *ante*, 461, 462, and *Hart* v. *Dally*, 2 Dowl. 257.

(*k*) *Rix* v. *Kingston*, M. T. 1834, 9 Legal Obs. 110, and 3 Dowl. 159.

(*l*) *Ante*, 461, 462.

(*m*) *Hart* v. *Dally*, 2 Dowl. 257.

(*n*) *Ante*, vol. iii. 183 to 185; *Pepper* v. *Whalley*, 1 Bing. N. C. 71; 2 Dowl. 84; *Knowles* v. *Johnson*, id. 653.

stead of stating the Christian or first name in full. (o) Where a prior action has been defeated by a plea of nonjoinder, we have seen that the Reg. Gen. of Hil. T. 4 W. 4, Reg. I. r. 20, prescribes a particular form of commencing the declaration in a fresh action. (p) When the plaintiff sues, or the defendant is sued in a representative or particular character or right, the declaration usually describes the same accordingly in the commencement. (q) But it would suffice to state such right or character in the body of the declaration; and the Gen. Rule Hil. T. 4 W. 4, r. 21, orders, "that in all actions by and against "assignees of a bankrupt, or insolvent, or executors, or adminis- "trators, or persons authorized by act of parliament to sue or "be sued as nominal parties, the character in which the plain- "tiff or defendant is stated on the record to sue or be sued, "shall not in any case be considered as in issue, unless *espe- "cially denied.*"

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When once the full Christian and surnames of the plaintiff and defendant have been stated in full in the commencement, it has for some years been the practice, after *once* stating the names at length in the declaration, subsequently to describe the parties as "the *plaintiff*" or "the *defendant*;" and although that form is not expressly recognized in the late rules, it is still advisable to continue it. (r)

Not necessary to state the *form of action* in the commencement.

It will be observed that the first and second forms of commencement prescribed by the rule Mich. T. 3 W. 4, conclude with an *&c.* (s) and hence it is probable that the present practice commenced of inserting in lieu of such, *&c.* a concise description of the form of action, the same as stated in the writ, as thus: "was summoned to answer the said A. B. '*in an action on promises,*' or '*in an action of debt,*'" or other form of action, precisely as in the writ, and as fully stated in a preceding page. (t) But it seems to be quite clear that it was not intended, by introducing the *&c.* in the above forms of commencement or otherwise, to require in the *commencement* of a declaration *any* statement whatever of the *form* of action mentioned in the writ; but on the contrary it was intended that in lieu of the *&c.* the *body* or substantial part of the declaration should *immediately* commence with the usual words, "*For*

(o) And see *ante*, vol. iii. 164 to 169, as to describing the name of defendant in general.

(p) *Ante*, 459.

(q) See the forms, 2 Chitty on Pleading, 6th ed.

(r) *Meeke* v. *Oxlade*, 1 New R. 289; *Stevenson* v. *Hunter*, 2 Marsh. 101; 6 Taunt. 406, S. C.; and see the pleading forms, Trin. T. 1 W. 4, and Hil. Term, 4 W. 4, which appear similar to that form.

(s) *Ante*, 454, 455.

(t) *Ante*, vol. iii. 197, 198.

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that whereas, &c." or "*For that &c.*" stating the cause of action. (*u*) And the safest course seems to be to omit in the commencement any statement of the *form of action* named in the writ; for although, perhaps, if the subsequent *body* of the declaration should substantially correspond with the writ in a substantial statement of the same form of action as that stated in the writ, a mistatement in the commencement might be rejected as surplusage, and certainly would not be ground of *demurrer*; (*x*) yet the unnecessary statement in the commencement might invite observation and objection, and occasion expense; and where the intended form of action in the body would, from *ambiguity*, be doubtful, the *description* in the commencement might be deemed decisive. (*y*) It is clear that a variance or mistatement of the form of action in the body of the declaration being a mere nonobservance of a rule of Court, is not ground of demurrer, (*z*) because as the writ does not appear on the face of the record, there is not in any paper book, or record, any disclosure of the variance; but if at all, the variance must be established, as an *extrinsic* fact, to be verified by affidavit, but is only the subject of summons or motion to set aside the declaration for *irregularity*, and not of setting aside the writ or arrest, or for discharging the bail

(*u*) *Semble*, and see Petersdorff, Precedents on Pleading, page 3, note 7, *id* page 5, note 5, citing *Lord* v *Houston*, 11 East, 62, Pleader's Assistant, 292, and see form of issue as prescribed by Reg. Gen. Hil. T. 4 W. 4, *post*.

(*x*) *Neal* v. *Richardson*, 2 Dowl. 89, citing *Marshall* v. *Thomas*, 3 Moore & S. 98; *Anderson* v *Thomas*, 9 Bing. 678; and see *Lord* v. *Houston*, 11 East, 62. Before the uniformity of process act, 2 W. 4, c. 39, and the above rule of Mich. T. 3 W. 4, the Reg. Gen. Hil. T. 2 W. 4, reg. 4, ordered, "that the rules theretofore made in the King's Bench and Common Pleas, for avoiding long and unnecessary repetitions of the original writ in certain actions therein mentioned, should be extended and applied in the King's Bench, Common Pleas, and Exchequer, to *all personal and mixed actions*, and that in none of such actions shall the *original writ* be repeated in the declaration, but only the nature of the action stated, in manner following, viz "A. B. was attached to answer C. D. in a plea of trespass [*or* "in a plea of trespass and ejectment,"] or as the case may be, and any further statement shall not be allowed in costs;" and see the former rules referred to and observed upon in Tidd, 435; 1 Saund. Rep. 318, note 3, and 339, note; Chitty on Pleading, 5th edit. vol. ii. 848, 849 In *ejectment* the above rule will still apply in the King's Bench and Common Pleas. See form, Chitty's Addenda to Summary of Practice, 33, note 4. But in the Exchequer a declaration in ejectment is still to commence and conclude as if preceded by a quo minus. *Doe* d. *Gillett* v. *Roe*, 1 Crom. Mee. & Roscoe, 19, 3 Moore & Scott, 376.

(*y*) *Savignac* v. *Roome*, 6 T. R. 130.

(*z*) *Anderson* v. *Thomas*, 9 Bing. 678, *supra*, *Thompson* v. *Dicas*, 2 Dowl. 94, *Marshall* v. *Thomas*, *id.* 205, *Rotton* v. *Jeffery*, 2 Dowl. 637, in the last case the writ and *commencement* of declaration was in *debt*, but in the body *assumpsit*, the Court on motion refused a rule, but merely because plaintiff would apply to amend. According to *Dobson* v. *Sterne*, 1 Bos. & Pul. 366, and *Clarke* v. *Crosby*, in MS. case, in 1 Chit. on Plead. 314, 315, 5th edit. an informality in the *commencement* of a declaration, though technical, is not in general ground of *demurrer* Formerly the commencement might assist in deciding on a doubtful form of action in body, *Savignac* v. *Roome*, 6 T. R. 130, *Wilkes* v. *Kirby*, Lutwych, 1509; *Franklyn* v. *Reeve*, 2 Stra. 1023; Com. Dig. Pleader, C. 12.

above, and the plaintiff is to be left to declare, if he can, according to the form of action named in the writ.(a) But if the *form of action*, as well in the *commencement* as in *the body* of the declaration, vary from the form named in the *writ*, a summons in vacation, or motion in term, to set aside the declaration for irregularity, may be sustained, (b) although on principle, if the *body* of the declaration be in the same form of action as that expressed in the writ, any mistake in that respect in the *commencement* ought to be rejected as surplusage, being an unnecessary statement. But it seems that, provided the writ and declaration accord as to the *form* of action, as being each in *debt*, it is immaterial, except, perhaps, in bailable actions that the declaration varies from the writ as respects the *cause* of action, and a variance in the latter respect may be rejected as surplusage, as where the commencement of a declaration in debt, described the plaintiff to be suing *as assignee* of the late sheriff, and then the plaintiff declared in the body of his declaration on a bond made to himself.(c)

The 2 W. 4, c. 39, s. 8, directs, that when a defendant is an actual prisoner in custody of the Marshal or the Warden, the commencement of the declaration may so allege, although the process was out of another Court; but such allegation cannot be traversed by plea.(d)

It is very usual, even since the rule of Mich. T. 3 W. 4, prescribing the forms of commencement in the framing the same, after first naming the plaintiff, to add the words "the plaintiff in this suit," and after first naming the defendant, to add "the defendant in this suit," and then throughout the declaration and subsequent pleadings to describe the parties as "the said plaintiffs," or "the said defendants," without repeating their names. But since such rule, it seems advisable to introduce those descriptions of the parties only in the *body* of the declaration. It is *there* proper, at least when the names of the parties would be numerous. (e)

It has been usual in an action of *debt*, in the commencement to state that the defendant was brought into Court to answer

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(a) *Ward* v. *Tummon*, 1 Adolp. & Ellis, 619.

(b) *Ante*, 197; *Thompson* v. *Dicas*, 1 Crom. M. & Ros. 768; 2 Dowl. 94, 95; 3 Tyrwh. 873, S. C.; *Scrivener* v. *Walling*, 1 Harrison's Rep. 8; 9 Legal Observer, 299; *Edwards* v. *Dignam*, 2 Cr. & M. 346; 2 Dowl. 240, S. C.; *ante*, vol. iii. 197; *King* v. *Skeffington*, 1 Cr. M. & Ros. 363.

(c) *Reynolds* v. *Welsh*, 3 Dowl. 441.

(d) *Barnell* v. *Harris*, 2 Dowl. 187; *Rex* v. *Kingston*, 9 Legal Observer, 110; 3 Dowl. 159; *ante*, vol. iii. 394.

(e) See *Meeke* v. *Oxlade*, 1 New Rep. 289; *Davison* v. *Savage*, 6 Taunt. 121; 2 Marsh. 301, S. C.; and *Stevenson* v. *Hunter*, 6 Taunt. 406; 2 Marsh. 101, S. C.

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the plaintiff of a plea of debt for £——, or of a plea that he render to the plaintiff the sum of £——, which he owes to and unjustly detains from him, stating the aggregate of the sums afterwards sued for in each count; but that allegation is unnecessary, and a mistake therein as to the sum could not be demurred to or taken other advantage of; (*f*) and if the commencement of a declaration in debt, at the suit of an executor, be improperly in the debet and detinet, that is no ground of demurrer, because the words "*owes to*" may be rejected as surplusage. (*g*) *Indeed that reason ought in all cases to be the answer to any objection against the correctness of the commencement of a declaration.* (*h*) We have seen that, at least in actions *not bailable*, upon a general writ, the plaintiff may declare in a particular character, and the defendant also may be declared *against* in a *particular* character. (*i*)

5thly. Of the body of the declaration; statement of *time* of cause of action.

5thly. *The Body of Declaration.*—With respect to the statement of the *time* in the body of the declaration, when the cause of action accrued, it should, when time is material, be laid on the real day, and when not material, on some day on or before that on which the writ issued; but we have seen, that when the exact day is in law immaterial, as in an action for verbal slander, the statement by mistake, in a declaration, of a day after the writ issued, or after that on which the declaration was entitled, would be aided *after verdict*, and would not *afterwards* constitute a ground of motion in arrest of judgment or writ of error, because it will be inferred that the judge would not have suffered the plaintiff to obtain a verdict if the evidence had shown that the action was prematurely brought; but still the inconsistency might be pointed out by special demurrer. (*k*)

No statement of *venue* or place, except in trespass quare clausum fregit, when local description requisite.

With respect to *venue* or local description, as the rule 8 of Hil. T. 4 W. 4 orders, "and no venue *shall be* stated in the body of the declaration, or in any other subsequent pleading, provided that in cases where local description is now required such local description shall be given," it seems to follow that an unnecessary statement of venue, contrary to the directions in the rules, would now be an *irregularity*, though formerly there *must* have been a repetition of venue as well as time in every distinct allegation, or the defendant might have demurred. (*l*)

(*f*) *Lord* v. *Houston*, 11, East, 62, 65.
(*g*) *Collett* v. *Collett*, 3 Dowl. 211; 9 Legal Obs. 252.
(*h*) *Dobson* v. *Herne*; 1 Bos. & Pul. 366; *Clark* v. *Crosby*, *id.* 314, note (*f*); 1 Chit. on Pl. 5th ed. 313, 315.
(*i*) *Ante*, vol. iii. 181 to 183, 200; *Knowles* v. *Johnson*, 2 Dowl. 653.
(*j*) *Steward* v. *Layton*, 3 Dowl. 430; *ante*.
(*k*) *Ante*, 463, 464, *semble*.
(*l*) *Denison* v. *Richardson*, 14 East,

In a declaration necessarily of considerable length, the avoidance of the repetition of place might save a *few words*, but the repetition a *few* times in a short declaration, although in strictness a violation of the rule, will scarcely justify a respectable practitioner in taking out a summons to strike out the useless words, because the expense of that proceeding would be greater than that of the repetition objected to, (*m*) which has always been considered by the Courts as an objection against a summons or motion to strike out unnecessary matter. (*m*) It is certain that the unnecessary repetition of venue is not ground even of special demurrer, but is only an irregularity to be objected to upon summons to strike out the improper statement. (*n*) It must be remembered that the above rule, ordering that no *venue* shall be inserted in the body of the declaration, does not dispense with the necessity for the declaration in an *inferior Court* alleging that each material fact, or at least the cause of action, as well as the promise, occurred *within its jurisdiction;* (*o*) and in all the counts, whenever *place* is material, as where a contract is to be performed at a particular place, it must be stated with as much particularity and accuracy as heretofore, and a venue in the body of the declaration may still aid a defective venue in the margin. (*p*)

Declaration in trespass quare clausum fregit.

The rule Hil. T. 4 W. 4, V. 1. also orders that, " In actions " of *trespass quare clausum fregit*, the close or place in which, " &c. (meaning where the trespasses were committed,) shall be " designated *by name* or abuttals or other description, *in failure* " *whereof the defendant may demur specially*." (*q*) And this seems almost the only exception that the non-observance of the new rules as to pleading can in general only be objected to as an *irregularity*, and not as a ground of *demurrer*. The object of this rule, it has been observed, was not only to abolish the common bar or plea of liberum tenementum, but also the new assignment consequent thereon; and also to take away any necessity for a new assignment in many other cases on pleas of right of common, license, easements,

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300; *Pippin* v. *Sheppard*, 11 Price, 400; 1 Chit. on Pl. 289, 5th edit.

(*m*) See *Brindley* v. *Dennett*, 2 Bing. 184; 9 Moore, 388, S. C. where the Court observed that the application to strike out the alleged unnecessary matter was even more vexatious than the introduction of the matter itself.

(*n*) *Harper* v. *Chamneys*, 2 Dowl. 680, S. C.; 1 Crom. M. & R. 369; 4 Tyr. 859, named *Farmer* v. *Champneys*; *Fisher* v. *Snow*, 3 Dowl. 27; *Townside* v. *Gurney*, *id.* 168; 9 Legal Obs. 110.

(*o*) *Read* v. *Pope*, 1 Crom. M. & Ros. 302; *Salter* v. *Slade*, 1 Adol. & El. 608.

(*p*) *Doe* v. *Roe*, 3 Dowl. 323; 9 Legal Obs. 301.

(*q*) See decision on this rule, *Lempriere* v. *Humphrey*, 4 Harr. & Woll. 170; " abutting *towards*," is an incorrect description of abuttal.

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&c. particularly since the decisions that the word *close* is divisible. (r)

When declaration on a policy may be in the *alternative* as to interest of parties insured.

The rule Hil. T. 4 W. 4, further, in a declaration on a *policy of insurance,* allows the interest of the party insured to be thus averred in the *alternative,* contrary to the *general principles* of pleading, which will not admit of alternative allegations, viz. "That A. B. C. and D., *or some or one* of them, were or was interested," &c. And it may also be averred that the insurance was made for the use and benefit and on the account of the said person or persons so interested. The object of this particular rule was to prevent the necessity for several counts varying the statement of the parties interested, and by permitting this alternative allegation to render one count sufficient.

What other express alterations in body of declaration.

As regards any *single count,* except in the above instances of bills of exchange, promissory notes, and the common counts, and excepting in the allegation in a declaration on a policy of insurance, and the necessity for omitting venue, but naming the close or its abuttals in trespass quare clausum fregit, there is not any other *express* new regulation, though the prescribed forms may be considered *as models* which every pleader would do well to imitate as regards brevity. The new rules relating to pleading have however suggested to a very sensible author, that it may now be expedient, in declaring specially for any money demand, to admit, on the face of the declaration, any part payment, so as to prevent the defendant from occasioning delay or expense by a useless plea of such payment, an acute observation extremely advisable to be acted upon, (s) especially in those cases when the part performance would take a case out of the statute of frauds, or part payment of principal money or interest would take a case out of the statute of limitations, under the 9 G. 4, c. 14.

6. The conclusion of a declaration.

6. *The Conclusion of Declaration.*—Since the uniformity of process act, 2 W. 4, c. 39, abolishing the process by *quo minus,* a declaration in *personal* actions in *all* the Courts should conclude as in the form given in Reg. Gen. Trin. T. 1 W. 4, viz. "To the "plaintiff's damage of £——, and thereupon he brings suit, &c." varying, when the declaration is at the suit of assignees of a bankrupt, or others suing in auter droit, by introducing the word *as,* "to the damage of the plaintiffs *as* assignees, or *as* executors as

(r) Bosanquet's Rules, 59, note [57]; and see Chitty on Pleading, 6 edit. fully; and see older rules in K. B. and C. P. Mich. T. A. D. 1654.

(s) See Mr. Bosanquet's observations in his Rules of Pleading, 85, note (r), and forms there given; and *id.* 51, in note.

aforesaid;" and in actions qui tam, omitting the allegation that the plaintiff has sustained damage, because a common informer cannot recover any, inasmuch as his particular right to the penalty only attaches on his issuing his writ, and therefore he cannot claim any compensation for the *previous* detention. In the Exchequer it would now be irregular, if not demurrable, to conclude *quo minus*, though before it was an essential form. (*t*)

7thly. Statement of *pledges* to be discontinued.

7. *Statement of Pledges.*—The Reg. Gen. Mich. T. 3 W. 4, r. 1, we have seen, expressly orders, "that *the entry of* "*pledges to prosecute* at the conclusion of the declaration, *shall* "*in future be discontinued.*"

8. Other matters to be observed.

8. *Other Matters to be observed.*—We have thus enumerated the few instances in which the forms of declaration have been altered by recent statutes and rules, and which we have seen do not interfere with the previous principles or rules of pleading, which must still be observed; and amongst others, that requisite quality, that the declaration should *correspond with the process* in the names of the parties, the description of the character in which they sue and are sued, and in the nature of the cause of action. (*u*) But a defect in either of these respects, inasmuch as the same do not appear on the face of the declaration itself *without referring to the writ* or other *extrinsic* fact, would not constitute a ground of demurrer, but merely of *irregularity*, to be set aside or corrected upon summons or motion to the Court, and may therefore be properly considered as part of the *practice* of the Court rather than of the science of *pleading*.

Secondly, Prohibitions of unnecessary length in declarations by former rules and practice. General jurisdiction of the Courts to shorten unnecessary length in pleading.

At *common law*, and independently of any rule, each superior Court of Law has jurisdiction *to strike out unnecessary matter*, as in an action of debt for mortgage-money, a long description in the deed of the mortgaged premises, (*x*) or a covenant on which no breach is assigned, or a second count not in any respect materially varying from the first. (*x*) There are also several *express ancient rules of Court* upon the subject, which seem of late to have been lost sight of. (*y*)

(*t*) *Hirst* v. *Pitt*, 3 Tyrw. 264; but *semble* the words might be rejected as *surplusage*.

(*u*) Tidd's Supp. A. D. 1833, p. 122; *ante*, vol. iii. 181 to 185, 200; *Knowles* v. *Johnson*, 2 Dowl. 653; 1 Arch. C. P. [70].

(*x*) See instances *Dundass* v. *Lord Weymouth*, Cowp. Rep. 665; *Price* v. *Fletcher*, Rep. T. Hardw. 129, 727; 1 New Rep. 289; 1 Saund. 233, n. (2); Tidd, 9th ed. 616, 619; 2 Arch. K. B. 4th ed. 828.

(*y*) In K. B. M.T. 1654, s. 12, 13, 16; in C. P. Reg. M.T. 1654, s. 16, 17, 19.

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The like express powers by ancient rules of M.T. 1654, in K.B. and C.P.

Thus it appears that the judges as well of King's Bench as Common Pleas in M.T. 1654, amongst other very important rules ordered, *that pleadings* be succinct without unnecessary repetitions, and that in pleading a general statute it be not recited, but the declaration conclude against the form of the statute; and that in actions of covenant no more of the deed than is necessary for the assignment of the breach, and not to repeat the covenant in the conclusion; and that in actions of slander long preambles be forborne, and no more inducement than what is necessary for the maintenance of the action, but where it requires a special inducement or colloquium; and that declarations in trespass quare clausum fregit may mention the place certainly, and so prevent the use and necessity of the common bar and new assignment, and which in that case are to be forborne, and some other regulations importantly affecting pleadings. (*z*) In these and other cases there are many instances of a judge or Court striking out the superfluous matter, and making the plaintiff pay the costs. (*a*)

Impolicy of over-statements in pleadings.

Independently also of costs it was always injudicious, especially in actions for damages, to make any *over-statement* of the supposed injury, particularly in actions for a *common assault* or slander, because *inflated descriptions* afford the defendant's counsel an opportunity of commenting, sometimes with considerable effect to a common jury, on the absurd discrepancy between the plaintiff's declaration and his evidence, and of turning the cause into ridicule; so that juries have perhaps merely on that account given nominal damages less than forty shillings, when they might otherwise have given the plaintiff a sum at least sufficient to entitle him to full costs. (*b*)

(*z*) Reg. M.T. 1654, K.B. s. xii. to xvii.; K.B. s. xiv. to xix. C.P.

(*a*) Tidd, 9th ed. 616 to 619; and *post.*

Instances of injudicious unnecessary statements.

(*b*) As if a declaration in fact for a single blow with the open hand should absurdly state, that the defendant with swords, sticks, staves, whips, and other weapons, and with fists, assaulted and beat and knocked the plaintiff down, and pulled and dragged him about on the ground, and pulled the plaintiff by the nose, and kicked and wounded and bruised him, giving him divers blows on and about his head, face, breast, back, neck, shoulders, arms, thighs, legs, feet, and belly, *and divers other parts of his body*, whereby he became sick, sore, lame, diseased, and disordered, *and his life was greatly despaired of, &c. &c.*, though the form usually adopted and even recommended as proper by some able pleaders, see 1 Saund. Rep. 14, note (3). So in a declaration for trifling slander it may be advisable to omit the usual words, stating that the plaintiff was of *good name, fame, credit*, and *reputation*, or other words affording counsel an opportunity to turn the declaration into ridicule, and suggesting to the jury the expediency of giving the plaintiff a verdict for one shilling, i. e. three-pence for his good name, and the like for each of his other extraordinary qualities. A case of this nature was lately so turned into ridicule, the commentator quoting—

Iago—What, are you hurt?
Cassio—Ay, past all surgery.
Iago—Marry, heaven forbid!
Cassio—Reputation! reputation! reputation! O! I have lost my reputation! I have lost the immortal part, sir, of my-

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Fourthly, Origin of *several counts* for the same cause of action.

But whilst the judges had no power to amend variances that appeared pending a trial, the practice was to introduce *several counts* varying the statement of the right or injury, and as recently described by a learned judge *in the nature of safety-valves, to be used only if occasion should require*; (*c*) and the Courts did not, unless in cases of obvious vexation, interfere to reduce the number, unless by consent; and if the plaintiff obtained a verdict on any one count, he was entitled to recover from the defendant the costs of so much of the pleadings and of the briefs and evidence as related to the issue on which he had succeeded, and although the plaintiff *did not receive* costs in respect of those counts on which he did not succeed, (*d*) yet he was not required to pay to the defendant the costs he thereby incurred; (*e*) and yet on principle, admitting that a plaintiff might be right in purchasing safety by the help of so many counts, between which there was but a very slight difference, there could be no reason that he should be entitled to do so at the defendant's expense. (*f*) The consequence was, that those who prepared pleadings on the part of the plaintiff took care, by inserting *several varying counts* for the same cause of action, to avoid all risk of variance; and the circumstance of the plaintiff's *not receiving* costs on counts not proved, was not of itself sufficient to restrain the introduction of a great variety of counts. (*g*) However, in an action at the suit of an executor, it was always considered imprudent to

self, and what remains is bestial. My reputation! my reputation!

Othello, Act II. Scene 3.

A very discreet and skilful *Leader*, (afterwards elevated to the bench,) to avoid the great danger of ridicule in some cases, used frequently to request his junior in *opening the pleadings* not to state the particular description of the assault or of the libel or slander as stated in the declaration, but merely to state that "the "plaintiff in his declaration complains of "an assault and other personal injuries "committed by the defendant," (or is for a libel or slanderous words affecting the plaintiff;) "and the defendant has pleaded not guilty, &c." according to the facts. Thus avoiding the risk of predisposing the jury or the auditors to laughter, which, if once excited, might be very injurious in the result.

So although there is an instance of the absurdity of joining with a count for criminal conversation a count in trover for wearing apparel and household furniture, *James* v. *Biddington*, 6 Car. & Payne, 589, 590, and the introduction of special damage, by the plaintiff's loss of a customer at bathing-rooms, in consequence of words directly charging an unnatural crime; yet no sensible practitioner would in his own practice permit such joinder, affording the defendant's counsel an opportunity of observing to the jury, that the plaintiff thought as much of and put as high a value on the wife's clothes and his customer's subscription, as he did on her affections or his own character.

(*c*) See Vaughan, B., *Ward* v. *Bell*, 2 Dowl. 76; 1 Cromp. & Mee. 846, S. C.

(*d*) *Ward* v. *Bell*, 1 Cromp. & Mee. 848; 2 Dowl. 76, S. C.

(*e*) Tidd, 9th ed. 972; 1 Chitty on Pleading, 5th ed. 448, 449; *Hopkins* v. *Barnes*, 2 Price, 136; see 2 Bing. 412, where *nine* counts were allowed in an action for slander, though the words used were very few.

(*f*) See the sensible argument of Mr. Wightman in *Ward* v. *Bell*, 2 Dowl. 76.

(*g*) And see further as to the use of several counts Stephen on Pleading, 315; Wordsworth on Rules, 35, 36; and more fully 1 Chitty on Pleading, 445 to 451.

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add a count on a supposed promise to himself, unless the evidence in support of it was most certain, because if he failed in the action, he was then considered liable to pay costs; though if the declaration had been confined to counts on promises to the testator, he suing only as executor, would not, before the enactment in 3 & 4 W. 4, c. 42, s. 31, be liable to pay costs. (h) We will now state in what respects the *length of declarations* has been moderated by recent rules.

Fifthly, Alterations by Reg. Gen. Trin. T. 1 W. 4, reducing length of counts on *bills and notes and indebitatus counts, accounts stated in assumpsit* and *debt*, and abolishing quantum meruit and valebant counts.

We have seen that the General Rule of Trin. T. 1 W. 4, though declaratory of a more extensive principle, yet only extends to a few cases, though certainly very frequently occurring in practice, relating to declarations on *bills of exchange and promissory notes*, and the common *indebitatus counts* as well in assumpsit as debt, and orders, that if such counts shall exceed the prescribed length, no costs of the excess shall be allowed to the plaintiff if he succeed in the cause, and that such costs of the excess as had been incurred by the defendant shall be taxed and allowed to the defendant; and that on the taxation of costs as between attorney and client, no costs should be allowed to the attorney in respect of any such excess of length; (so that an attorney cannot even subject his own client to the unnecessary expense); and in case any costs shall be payable by the plaintiff to the defendant on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill. The effect of this general rule is to reduce to three or four folios the length of the very frequent declarations on bills of exchange, promissory notes, and common debts, which used formerly to occupy about twenty-five folios; and the difference in length is not only saved in the *declaration*, but also in the *inquiry, issue, nisi prius record*, and *subsequent proceedings*, when any. This Reg. Gen. by prescribing concise forms of indebitatus counts and limiting the length, *impliedly abolished* the quantum meruit and quantum velebant counts, which, though usually inserted, were never necessary,(i) though formerly considered otherwise by high authority, who indeed stated those counts as illustrations of the use of a second count to avoid variance. (k)

Sixthly, Alterations by Reg. Gen. H.T. 2 W. 4, r. 74.

Reg. Gen. of H. T. 2 W. 4, r. 74, ordered, that "*no costs* "*shall be allowed on taxation to a plaintiff upon any counts* "*or issues upon which he has not succeeded; and that the*

(h) *Ashton* v. *Poynter*, 1 Gale, 57; 3 Dowl. 465.

(i) 2 Saund. 122, n. (2).

(k) 3 Bla. Com. 295.

Plaintiff to be allowed costs only on issue on which he succeeds, and costs of issues found for defendant to be deducted or paid.

costs of all issues found for the defendant shall be deducted(*l*) *from the plaintiff's costs.*(*m*) And it has been held, that even the plea of general issue to a declaration containing several counts, or several distinct allegations in one count, creates as many issues as there are counts or allegations within the meaning of this rule, and that the defendant is entitled to costs upon every count on which the plaintiff fails.(*n*) Hence the pleader should not insert in a declaration more than it can be ascertained the plaintiff will be able to prove, and if he do, the costs of the pleadings, briefs, and witnesses, as to the part on which the plaintiff fails, will fall upon him; and this rule applies to each separate count in ejectment.(*o*) And it has even been decided, that if a plaintiff do not prove all the words in one entire count in slander, but fail as to part, on the ground that the latter did not relate to him, as alleged in an innuendo, the defendant is under this rule entitled to the costs of so much of the pleadings so found for him.(*p*) In these cases the defendant will be entitled not only to the costs of so much of the *declaration* as is found in his favour, but also of so much of his *special pleas* as have been found for him, and also of *so much* of his *briefs* and *evidence* as *solely* or *principally* related to the same,(*q*) but not of more; and the plaintiff has a right to what are termed the *general costs* in respect of the issues found for him.(*r*) And if the jury find for the defendant upon one issue, and the judge thereupon discharge them as to the other issues, it was held that the defendant was not entitled to the costs of the pleadings or witnesses, in respect of the issues upon which no verdict was given.(*s*) So if the jury find *immaterial issues* in favour of a defendant, and the plaintiff afterwards obtain judgment non obstante veredicto, neither party is entitled to the costs of those issues under this rule of H. T. 2 W. 4.(*t*) And where in an action of slander the jury gave £50 damages on the first count, and £100 damages on the other nine counts, one of which latter counts was upon a writ of error held bad, and the plaintiff agreed to remit the £100 damages, it was held that he thereby gave up all the costs

(*l*) And if the latter costs exceed the plaintiff's, defendant may recover them, *Milner* v. *Graham*, 2 Dowl. 422.

(*m*) See Jer. Rules, p. 62, n. (*x*); *Cox* v. *Thompson*, 2 Cromp. & Jer. 498; *Knight* v. *Brown*, 1 Dowl. 730; *Richards* v. *Cohen*, 1 Dowl. 533.

(*n*) *Cox* v. *Thompson*, 2 Cromp. & Jer. 498.

(*o*) *Doe* v. *Webber*, 1 Harr. 10.

(*p*) *Prudhomme* v. *Fraser*, 1 Harr. & Woll. 5; 4 Nev. & Man. 512.

(*q*) *Larnder* v. *Dick*, 2 Cromp. & Mee. 389; 2 Dowl. 333; 4 Tyr. 239, S. C.; *Eades* v. *Everatt*, 3 Dowl. 687.

(*r*) *Larnder* v. *Dick*, 4 Tyr. 239; 2 Dowl. 333, S. C.; 2 Cr. & M. 389, S. C.

(*s*) *Valance* v. *Adams*, 2 Dowl. 118.

(*t*) *Goodburne* v. *Bowman*, 2 Dowl. 206.

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on the last nine counts, (u) a case strongly evincing the great hazard of improvidently introducing any *doubtful* count; and under this rule the defendant is entitled to the costs of all the issues found for him, although they exceed the costs of those found for the plaintiff. (x) Since this rule, therefore, and before and independently of the rule H. T. 4 W. 4, it is important that the declaration and pleadings on the part of a plaintiff should state no more than can be proved on his behalf, for otherwise the defendant's costs may be equal to, if not exceed, those of the plaintiff. It seems, however, that a defendant should now at the trial confine the plaintiff to one of several counts, and that it is too late afterwards to move the Court for the purpose. (y) Thus when a verdict was taken on all the counts by consent, with liberty to move to enter a nonsuit, the Court refused, after that motion had been discharged, to allow the defendant to confine the verdict to any particular counts. (y) And even on a declaration for usury, containing thirty-seven counts, although there was only one transaction, the judge refused at the instance of the defendant to compel the plaintiff to elect on which count he would stand before the jury had given their verdict. (z) It was however held, even before the late rule, that if there be but one agreement, and the declaration contain several counts, the plaintiff can only have a verdict upon and the costs of one count, and that if the judge direct a jury otherwise, a bill of exception lies. (a)

This rule of H. T. extends to the result of an award, and where the arbitrator awards only as to a part in favour of the plaintiff, and as to the residue for the defendant, the defendant is entitled to the costs of the latter. (b)

On the other hand, it is essential on behalf of a *defendant* to keep in view, in all *his* pleadings, the inexpediency of raising any issue on which he is not certain of succeeding upon the evidence; for where the defendant pleaded the general issue and several special pleas, and the jury found for the *defendant* on the general issue, but for the *plaintiff* on the special pleas, it was held, that the plaintiff was entitled to the costs of the pleadings, and witnesses, and evidence, relating to such special pleas. (c) The above is to be understood with this quali-

(u) *Dadd* v. *Crease*, 2 Cromp. & Mee. 223; 2 Dowl. 269.
(x) *Milner* v. *Graham*, 2 Dowl. 422.
(y) *Martin* v. *Coleman*, 1 Harr. 86.
(z) *Swinburn* v. *Jones*, 1 Moo. & Rob. 322.
(a) *Ward* v. *Bell*, 2 Dowl. 76.
(b) *Daubuz* v. *Rickman*, 1 Hodges, 75; *Eades* v. *Everatt*, 3 Dowl. 687.
(c) *Hart* v. *Cutbush*, 2 Dowl. 456.

fication, that where some issues are found for the plaintiff, and some for the defendant, although the latter is entitled to the costs of the issues found for him, as respects the *pleadings*, yet he is not entitled to the *general* costs of the cause, or even to the expenses of his own witnesses, unless their evidence related *exclusively* or principally to the issues found for him. (*d*)

Seventhly, Practical consequences affecting the structure of declaration or plea, &c.

This rule renders it extremely important, as regards the costs, that before drawing a declaration, or plea, or other part of pleading, the attorney for the party pleading should ascertain whether the *evidence* will certainly sustain every part of his proposed pleading, and to inform his pleader accordingly, whose province it will be to exercise due caution, as well in the number of distinct allegations as in the mode of describing them. The general operation of this Reg. Gen. of Hil. T. 2 W. 4, r. 74, will be, that a plaintiff or defendant will, independently of Reg. Gen. Hil. T. 4 W. 4, 5, 6, & 7, be entitled to *receive* the costs of all pleadings, and parts of pleadings, found *for* him, and be liable to *pay* the costs of all parts of pleadings found *against* him, but under such rule there is not that *punishment* in the total loss of costs on the parts of pleadings found for him, as we shall find is provided by Reg. Gen. Hil. T. 4 W. 4.

Eighthly, The pleading rules of Hil. T. 4 W. 4, r. 5, 6, 7, viz. reg. 5, prohibiting more than *one count* on the same subject-matter, and giving instances, but permitting *several breaches*. (*e*)

By far the most important of the new rules are those of Hil. T. 4 W. 4, rule 5, 6, 7, which *imperatively* prohibit *several* counts, "unless a *distinct subject-matter of complaint* "is intended to be established in respect of each," or plea substantially proceeding on the *same ground of defence*. These rules are to be examined, *first*, as to the *operation* of the prohibitory provision, and *secondly*, as to the *consequences* of non-observance. As regards *declarations*, the terms of the fifth rule are: "Several counts shall not be allowed, unless *a distinct subject-matter of complaint* is intended "to be established in respect of each." It is certain, that in ancient pleadings more than one count was not inserted, unless there were really several distinct claims, but then formerly the subjects of litigation were but few, especially in assumpsit and case, and most of the forms of declaration were to be found in the Registrum Brevium. In modern times, if every active attorney *could always secure correct instructions* and a statement

(*d*) *Larnder* v. *Dick*, 2 Dowl. 333; *Eades* v. *Everatt*, 3 Dowl. 687.

(*e*) See the precise terms of the rule *ante*, 455.

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of facts, *precisely as the witnesses will prove them* on the trial, then a careful and intelligent pleader could not have occasion to introduce more than one count in a case falling strictly within the above rule. But it has very often occurred, and ever will occur, that even intelligent and honest witnesses, who have been applied to before declaring, and for the very purpose of declaring correctly, to make their statements of the transaction, even in writing, yet they will afterwards, on the trial, very materially vary in giving their evidence, and thereby a material variance will arise; or in the original statement one or more witnesses would vary very materially in their account of the transaction to the account given by other witnesses. In these cases, especially when the proof depended on verbal evidence, and not on written documents, cautious pleaders would introduce several counts varying the description of the contract, or the right, or breach, or injury, according to the varying statements of such witnesses, and even when there had not been any known discrepancy in the evidence, experience having informed pleaders what are the ordinary variations in transactions, they inserted such counts as they deemed it probable would enable the plaintiff on one or the other of such counts to obtain a verdict. (*f*) But as the legislature, by 3 & 4 W. 4, c. 42, s. 23, enabled a judge, upon a trial, to permit *any variance* to be amended, provided it did not prejudice the other party on the *merits*, it was considered expedient, at the same time, by s. 1, to enable the judges to make such alterations in the course of pleading as they might think fit, with the exception, that where any particular statute had given a right to plead the general issue, and to give the special matter in evidence under it, that right should continue. The learned judges, by the rules promulgated under the authority of that enactment, reciting such powers of amendment, and evidently supposing that they would be *fully and liberally acted upon*, and that, therefore, the introduction of *several* counts upon the same transaction, with the view *to avoid the risk of variance*, would no longer, in practice, be necessary, *therefore promulgated* the above rule, which, from fear of consequences as respects costs, has in effect put an end to the practice, (at least

(*f*) In *Nelson* v. *Griffith*, 2 Bing. 412; nine counts for verbal slander were permitted. The case of *The King* v. *Archbishop of York and others*, 1 Adol. & Ell. 394; and 3 Nev. & Man. 453; in the former of which, p. 398, the declaration is set forth, and is a strong instance that cases will occur, where it will be very hazardous to rely on one count alone. Mr. Tidd and the author considered it necessary to introduce even *five counts*; and a learned judge at Chambers, and the Court in Banc afterwards, were of the same opinion.

without the risk of incurring severe punishment in costs,) of introducing more than one count upon one and the same transaction; and so long as the judges *very liberally* exercise their powers of amendment, there can be no objection to the rule, which, by shortening the pleadings, will materially lessen the entire expense of a trial.

But unfortunately instances have occurred where learned judges have refused amendments, and afterwards regretted their decision. (*g*) Certainly, in cases within the rule, every attorney, and every pleader, must exert much more care and attention in obtaining instructions for and preparing the single count, and the former should, in strictness, see and carefully examine every witness to the transaction before he declares, and where witnesses are hostile, or access to them cannot be had, the risk of a trial and a nonsuit, in respect of a variance which the judge may refuse on the trial to amend, is since this rule considerably increased, and cannot be avoided even by the most active and intelligent endeavours. In short, the common law liberty of introducing several counts for security was abridged, and, indeed, in effect, annulled, upon an understanding that a plaintiff *shall*, on the trial, be allowed to amend; but, unfortunately, it is not by any means of course that such amendment will be allowed, and this, although it be made appear that another learned judge had refused to allow the introduction of the very count which, had it been inserted, would, without any favour or amendment, or payment of costs, have entitled the plaintiff *as of course* to the verdict.

Ninthly, When or not several counts may and should still be inserted.

It will be observed, that in explanation of the meaning of the words, "*unless a distinct subject-matter of complaint* is intended to be established in respect of each," the rule gives several *examples*, which practitioners and students must carefully consider, not only as in effect constituting part of the positive rule in those particular instances, but also as greatly elucidating the intended operation of the rule in other cases. (*h*)

It will also be expedient to study the examples when or not *several pleas* shall be admissible and the decisions thereon, for in cases where two or more pleas would be admissible, perhaps in cases similar on principle, *several counts* ought also to be admitted; as where in an action of trover for wool the defendant

(*g*) *Jelf* v. *Oriel*, 4 Car. & P. 22; *Doe* v. *Errington*, 3 Nev. & Man. 646; *Parker* v. *Ade*, 1 Dowl. 646; 1 Cr. & M. 429, S. C.

(*h*) See the rule and instances, *ante*, 455 to 458.

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was permitted to plead a lien by custom, a lien by agreement, and two other pleas of lien nearly similar. (*i*)

It will be observed that the fifth rule expressly excepts a count upon an *account stated;* so that after a special or a common count for the original debt, a count upon an account stated *may* always be added, though it should not unless there be evidence of a *subsequent accounting* or an admission to the plaintiff himself of a named balance being due to him; for otherwise, if the plaintiff fail on that count, he may still, under Reg. Gen. Hil. T. 2 W. 4, r. 74, have to pay costs of the issue as to that count. (*k*) The rule declares, that the several *examples* shall be considered merely as *instances* not intended to narrow or restrict the rule in its operation or its principle. It is however declared that the rule shall not prohibit the introduction of several *breaches.* (*l*)

Some of the learned judges appear to have considered that if the declaration *might,* notwithstanding the fifth rule, contain two or more counts varying the statement of substantially the same right or cause, then it is not a case in which a judge can be required or expected to exercise his discretion to permit an amendment; as in a declaration against a sheriff, the first count for an actual arrest and an escape, the plaintiff might add a count for *not arresting when there was an opportunity;* and if on the trial, for want of such a count, or a declaration contained only one count for an injury to a watercourse in right of a *mill,* when a count in right of a *close* might have been added; (*m*) and if so, the pleader might be censured for not inserting more counts accordingly. (*m*) It is however expressly declared, "that the *examples* are given only as some *instances* of the application of the rules to which they relate, but the *principles* contained in the rules *are not to be considered* as *restricted* by the examples specified." The words "*Distinct subject-matter* of complaint," obviously mean a *distinct* and *separate substantial cause of action* (always including a right, and an infraction of that right), and as distinguishable from a mere *variation* in the *mode of describing* the *same* debt or injury; and pro-

(*i*) *Leuckhart* v. *Cooper*, 1 Bing. N. C. 509; 1 Hodges, 16; 3 Dowl. 415, S. C. Some persons have doubted whether as *all* those pleas could not be established on the trial, but only *one*, they were not mere variations in statement, and not statements of distinct grounds of answer or defence, and consequently not properly admissible; see terms of rule Hil. T. 4 W. 4. reg. 5, *ante*, 455.

(*k*) *Ante*, 457; see 1 Chitty on Pleading, 391, as to when a count on an account stated is sustainable.

(*l*) *Ante*, 457.

(*m*) Per Patteson, J. in *Frankum* v *Earl of Falmouth*, as stated in Bosanquet's Rules, 14, in notes; and see *Guest* v. *Everett*, 9 Legal Observer, 75; Chitty on Amendment of Variances, 26, 27.

bably were intended to prohibit more than one count, when there could in justice be only *one recovery of damages*. Supposing, therefore, that there have *in fact* been two distinct promises to pay the same debt,—the one on an *executory* consideration, and the other on an *executed* consideration; or, in other words, one promise to pay before the work was done, or other consideration given, and another promise in fact to pay after the work was done, or consideration given, then (with the exception of an account stated) only one count is to be allowed, because there is only one subject-matter of complaint, viz. the nonpayment of only *one debt*. (*n*) It has however been suggested, that in an action against the sheriff for an *escape*, there may be two counts,—the first stating an *actual arrest* and *escape*, and a second count stating that the sheriff *did not arrest* the original defendant when he had an opportunity, and which breach of duty might have in fact occurred on another occasion, either before or after the actual arrest, and which might have created a *distinct* cause of action; (*o*) and that in an action on the case for a disturbance of a right to a watercourse there might perhaps be a count stating the right in respect of *a close* of the plaintiff and another count in right of *a mill*. (*p*) As the terms of Reg. Gen. Hil. T. 4 W. 4, reg. 5, prohibiting *several pleas* carrying the statement of the same ground of defence, are the same as those prohibiting several counts carrying the statement of the same subject-matter of complaint, it would seem that, on principle, decisions in favour of admitting several pleas would also be applicable to several counts; and if so, then, as in an action of trover, the Court of Common Pleas permitted four varying special pleas, each describing as a defence a right of lien, viz. one founded on custom, another on agreement, another on a custom differently stated, and the other a different custom, it would seem that equally should a plaintiff be allowed in cases of doubt to introduce four counts similarly varying. (*q*)

A very sensible author has supposed, that with analogy to the instance stated in the rule, " that a count for freight upon

(*n*) See an instance in *Marsh* v. *Griffin*, *post*.

(*o*) Per Patteson, J. in *Guest* v. *Everest*, 9 Legal Observer, 75; and Bosanquet's Rules, 13, in note.

(*p*) *Frankum* v. *Earl of Falmouth*, as stated in Bosanquet's Rules, 14, in notes, S. C. in 1 Harr.; 4 Nev. & Man. 330; 6 Car. & Pa. 529; but do not in the latter notice that point.

(*q*) *Leuckhart* v. *Cooper*, 1 Bing. N. C. 509; 3 Dowl. 415; 1 Hodges, 16, S. C. *Hart* v. *Bell*, 1 Hodges, 6; *sed quære*, for in *Wilkinson* v. *Small*, 3 Dowl. 465, Mr. Justice Williams said, " The rule is much *more strict as to plaintiffs*, who are only allowed one count to each cause of action, and the reason is different, whereas defendants may have several *inconsistent pleas*.

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a charter party, and another count for freight *pro rata itineris*, upon a contract implied by law, are to be allowed." It would seem that where a party contracts to work by a certain plan, and that plan is so entirely abandoned, that the original contract cannot possibly be traced, and it cannot be said to which part of the work it shall be applied, in such case the plaintiff will be permitted to recover as if no such contract had been made, and to charge for the whole work done, according to its value, and the benefit actually received; and that in this case it will be necessary, *from the uncertainty of the event of the proofs*, as to whether they will show the special contract to have been wholly abandoned, or only deviated from, to join both counts. (*r*) However, in a late case, two learned judges at chambers separately considered that a plaintiff had no right to insert two counts, the first special, on a contract that if the plaintiff would take possession of a farm, and plough and sow it, in expectation of the fulfilment of an agreement for a lease, the defendant would pay the expenses thereof, in case the agreement should not be fulfilled; and a common count for work and labour and seed provided, although the plaintiff *bona fide* expected to prove, besides the special contract, a *distinct promise in fact* after the agreement had been abandoned, and the defendant had taken and derived the benefit of the labour and seed; and those learned judges on *summons* compelled the plaintiff to elect to proceed on the special count, and that for money had and received, and on an account stated, striking out the common counts for work and labour and seed, and that for money paid. (*s*)

Upon the whole, in practice, when an experienced pleader, after full consideration, thinks that the proposed several counts are essential for the purpose of just security to the plaintiff to be introduced, and that they do not contravene the rule, it seems to be advisable to insert all in the declaration, and explicitly to state his reasons to the learned judge in answer to any application to strike out all but one, and then, in case that judge should order them to be erased, to submit to his decision, and not pertinaciously to retain the counts objected to, at the risk of losing all the costs under the seventh rule; and in which case, should a variance appear on the trial, it is most probable the judge who presides at the trial, on proof of such

(*r*) Bosanquet's Rules, 19, note 14.

(*s*) *Marsh* v. *Griffin*, Hil. T. 1835, per Parke, B. and Bolland, B. at chambers; and see *post*, application to strike out counts.

prior proceeding at chambers, will permit an amendment, or the Court in banc would be disposed on motion for a new trial to afford redress.

Suggestions for changing the forms of declaring in some cases; as, declaring upon a *general duty*, and assigning *several breaches* thereof.

As these rules preclude the use of several varying *counts* upon the *same subject of complaint*, but expressly permit *several breaches* of one and the same contract in the same count, it may be advisable, when the law admits, to frame the declaration on an *implied duty*, and to declare upon the *duty* and assign as *many breaches* as may be applicable, instead of declaring on a supposed promise to perform a particular and specified *part* only of that duty; as, for instance, in an action of assumpsit against an attorney for negligence, the declaration might state his retainer to sue or defend, or to advance the plaintiff's money on security, "and that in consideration thereof, and of fees and reward, the defendant undertook to *observe and perform his duty* in that respect," and then in the same count it might be averred that it was the defendant's duty to do so and so; as, to take such due care of the conduct of the action or defence, or to take due care to endeavour to obtain proper security, &c. and then alleging as many breaches as may be deemed advisable. So in an action against a tenant holding under a parol demise for numerous breaches of implied good husbandry, the declaration might state that in consideration of the letting, or of the subsisting tenancy, the defendant undertook to observe the course of good husbandry, and use the premises in a tenantlike manner, and then assign as many breaches as will be supported in evidence. So, instead of several separate counts for illegal acts relating to the same distress, all or many might be included in one count, as a count stating a distress for *more rent* than was due, and then also averring that the goods distrained were of *much greater value* than the pretended arrear of rent, so as to constitute an excessive distress, contrary to the statute of Marlbridge; and then stating, that the goods having been so distreined, the defendant wrongfully impounded the goods off the premises without giving the plaintiff notice of the place of impounding; and then that the defendant sold part of such goods within five days, and neglected to have the goods appraised by two sworn appraisers before such sale; and that defendant did not sell the goods for the best price, that he might with due care have obtained; and that he sold *more than was necessary*, and that he did not *leave the overplus* with the sheriff, &c. and so on.

Tenthly, Pleading influenced by consideration of costs.

The pleader should anticipate that if he insert several counts that are even permissible under the new rules, yet if the defendant plead to each separately, or plead so as to put each allegation in issue, and there be no confidence of the plaintiff's success on both counts, it may become advisable to take out a summons for leave to withdraw the untenable count, instead of proceeding to trial at the great risk of having to pay to the defendant all the costs of his pleadings and evidence relating to the untenable count or allegation.

Eleventhly, The rule how far *imperative* on the judge at chambers, or at nisi prius.

The effect of the 6th and 7th rules is, that if a defendant, on receiving the declaration, be advised that it contains two or more counts, founded on the same subject-matter of complaint, he is at liberty to obtain a summons calling on the plaintiff to show cause before a judge at chambers, why the superfluous count should not be struck out. The 6th rule is *imperative on the judge* to make his order for striking out the superfluous count, "*unless he shall be satisfied, upon cause shown, that* "*some distinct subject-matter of complaint is bonâ fide intended* "*to be* established in respect of *each*;" and in that case it seems *imperative* on him, being of that opinion, to indorse upon the summons, or state in his order, as the case may be, that he *is so satisfied*, and also to specify the counts mentioned in such application which shall be allowed. (*t*) But still, under the seventh rule, however bonâ fide the plaintiff may have been considered by the learned judge at chambers to have acted in introducing such second or other count, yet if the plaintiff fail in establishing a *distinct ground of complaint*, a verdict is to be entered against him thereon, and he is to pay to the other party the costs occasioned by such count, including those of the *evidence* as well as of the *pleadings*; (*u*) and then comes the most serious part of the rule, viz. that if the judge on the trial, upon all the facts then before him, shall be of a different opinion to the judge who at chambers permitted the second or further count to stand, *i. e.* shall be of opinion that *no such distinct subject-matter of complaint was bonâ fide intended* to be established, and *shall so certify* before final judgment, (*x*) the party so pleading shall not recover any costs even

(*t*) The decision of a judge at chambers upon the introduction of a second count is probably *conclusive*, without appeal to the Court in banc, *semble*, see observations of *Denman*, Ch. J., in *The King* v. *Archb. of York and others*, 3 Nev. & Man. 453; 1 Adol. & Ell. 397, S. C.; *ante*, vol. iii. 35; see the forms of summons and order, *post*.

(*u*) We may remember that the plaintiff incurred the *same liability* in the previous rule of Hil. T. 2 W. 4, *ante*, 476, 7.

(*x*) The words "and shall so certify" seem to import that the judge at nisi prius has a *discretionary* jurisdiction, and that it is *not imperative* on him so to cer-

upon the issue or issues upon which he has succeeded, arising out of any count, &c. with respect to which the judge shall so certify.

Twelfthly, Observations on the effect of these rules; and impolicy of non-observance.

It has been urged, that these rules are unnecessarily harsh in depriving a plaintiff of the power of adding a count varying his statements, *especially in cases where he could not anticipate the evidence, perhaps, exclusively in the possession of the defendant*, and which might unexpectedly start up on the trial and occasion a variance, and it has been suggested that the rule should only have been, that the costs of counts and issues found for the defendant should be disallowed to the plaintiff and deducted from his other costs, *unless the judge trying the cause should certify that such counts were proper or reasonably introduced.*(y) But it is well known that this and all other objections to the terms of these rules were fully discussed and considered by the common law commissioners and by the learned judges before the rules were promulgated, and it was anticipated that if *any* exception to the rule prohibiting more than one count were allowed (as, for instance, a power to add *several counts by leave of a judge or of the Court*,) the applications would have been endless, and the rule itself would soon have become a dead letter, and it was considered that, supposing, as might be *justly* anticipated, the power of amendment in cases of variance would be *liberally exercised*, there was no occasion to permit any *exception* to the rule; and as regards the *punishment* of a party, by depriving him of the costs of the count and issue found in his favour, because he had improperly and injudiciously, with undue pertinacity, retained a redundant count, though primâ facie perhaps severe, yet the same is not in reality unjust, because such punishment could only follow where a plaintiff or his attorney had by some *fraud* or, at least, *misrepresentation, imposed on the judge at chambers*, by assuring him that there was another distinct cause of action, and thereby induced him to permit the second or subsequent count to continue, and it is not probable that the judge would on the trial certify that no distinct subject-matter of complaint was *or had been bonâ fide intended to be established in respect of each count* so allowed, unless he, upon due consideration, was

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tify, even though he may be of an opinion unfavourable to the plaintiff, as to the *bona fides* of his retaining the second count.

(y) Atherton on Personal Actions, and Rules, 117, 118. But see observations in Bosanquet on the New Rules, 30, in note.

satisfied that an imposition was *originally* intended to be practised, and certainly would not so certify when the plaintiff or his attorney had *fair ground* to expect that he might and would succeed in establishing such distinct claim.

The effect of these rules in practice will certainly be to render it essential for the plaintiff's attorney, in every case, very fully to enquire not only into the facts but also the sufficiency of the *evidence* in support of any *second count*, before he *introduces* or, at least, *persists in retaining* a second count in contravention of these rules, and, at least, if a summons should be obtained on the part of a defendant to strike out a second count, it will be advisable *not to persist* before the judge in retaining it, at the peril of his not succeeding on the trial in supporting it by overwhelming proof, and in cases of the least doubt it will be most prudent to consent to withdraw the obnoxious count, even with intent afterwards to commence a *distinct action* in respect of the cause of action to which such count was intended to apply.

Even the improper introduction of *venue* in the body of a declaration, or of one of the shortest parts of the prescribed common counts, as, " And in £100 for work and labour done " and performed, and materials found by the plaintiff for the de- " fendant at his request," would, if a summons were successfully obtained by the defendant's attorney to strike them out, occasion considerably more costs than even the retention of those few words.(z) If a defendant obtain a summons for leave to plead *several pleas*, and do not succeed as to one of them, the costs in that case in general are costs *in the cause*, (i. e. not to be paid till the conclusion of the action,) yet the same will, in case the plaintiff succeeds, increase the costs to be paid by the defendant to the amount of several pounds. Therefore, every practitioner should abstain from introducing more counts or pleas than he is confident a judge will suffer to stand.

The recent rules may also induce prudent practitioners to decline the consolidating or uniting several different claims in one declaration, and in that respect may tend to multiplicity of actions. In practice, amongst the majority of the most respectable practitioners, it is not usual to take out a summons to strike out a count under these rules, but they prefer to try the action liberally, admitting all fair variations as well in the declaration as in the pleas, and it is much to be regretted that

(z) As much as £4, or upwards, see the case of *Marsh* v. *Griffin*, *post*, " Of Applications to strike out Counts," and the items of costs there stated in the note.

any practitioner can be found who will adopt proceedings to strike out only a very few words, which have not nor will occasion any material expense, and certainly far less than the costs of the vexatious application, a circumstance which of itself was considered at one time an answer to any application to the Court of that nature. (*a*)

Thirdly, Other practical matters connected with declarations.

Having thus considered the operation of the recent statutes and rules as regards the *structure* of the draft of a declaration, a few practical points still remain to be examined, and which may be thus arranged.

1. Mode of engrossing or writing the declaration.

The 4 Geo. 2, c. 26, enacts that all pleadings shall be written in the *English* tongue, and be written in such *common hand* as acts of parliament are usually engrossed, *in lines and words to be written at length*, as the said acts usually are, and not abbreviated, on pain of forfeiting 50*l.* to a common informer; but the 6 G. 2, c. 14, enacts, that such penalty shall not extend to the expressing the names of writs or technical words, nor to abbreviations used in the English language. The stamp acts, 48 G. 3, c. 149, schedule, Part II. and 55 G. 3, c. 184, schedule, Part II. required copies of declarations to be written in the usual and accustomed manner, and it not having been the practice to write such copies on both *sides* of the paper, the Court of King's Bench held that a copy so written and delivered to a prisoner was irregular, and entitled him to be discharged out of custody. (*b*) But as that regulation had in view the stamps on each sheet of a copy of a declara-

(*a*) Vide *post*, "Of Striking out Counts, &c.;" see observations of the Court in *Brindley* v. *Dennett*, 2 Bing. 184.

(*b*) *Champneys* v. *Hamlin*, 12 East, 294; *Hartop* v. *Juckes*, 1 Maule & Sel. 709; *Doe* d. *Irwin* v. *Roe*, 1 Dowl. & Ryl. 562.

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tion, and all such stamps have since been repealed by 5 G.4, c. 41, that regulation may not now be material. The Court of Common Pleas refused to set aside a declaration on the ground that the common counts were partly printed and partly written, (c) and indeed that is now the constant course, as the common counts are usually printed in blanks, with spaces for names and sums to be filled up in writing. But care must be observed that no blank spaces be left that would render the sense uncertain. The declaration is always printed or written on paper, and not on parchment. A rule of the Court of Common Pleas of Mich. Term, 1654, reg. 18, promulgated to cause care in examination of the declaration, orders that if the plaintiff's attorney delivers a copy to the defendant's attorney, *materially varying* from the original declaration, the disadvantage thereof shall not be cast upon the defendant, but on the plaintiff, whose attorney is paid for it. And where the declaration in ejectment served on the defendant described the premises as situate in the wrong parish, varying from that on the record, and the plaintiff obtained a verdict, the Court granted the defendant a new trial, and compelled the plaintiff to make the record correspond with the declaration delivered, or pay all the defendant's costs and proceed to a new trial. (d)

2. Number of copies of declaration in case of prisoner.

In ordinary cases only one copy of the draft of declaration, fairly written, is filed or delivered. But formerly, in the case of a *prisoner*, it was essential to incur more trouble and expense by having *three* copies. But now, by Reg. Gen. Hil. T. 2 W. 4, reg. 36, it is ordered, " that when the plaintiff declares against a prisoner, it shall not be necessary to make more than *two* copies of the declaration, of which one shall be served and another filed, with an affidavit of service; upon the office copy of which affidavit, a rule to plead may be given." This rule assimilates the practice of the King's Bench to that of the Common Pleas, and dispenses with the previous necessity in the former Court to have three copies of declaration. (e)

3. Declaration in what cases to be *delivered*.

The recent statutes and rules do not appear to interfere with the former practice as to delivering or filing the declaration, and therefore recourse must still be had to the ancient practice. It will, however, be observed, that the Reg. Gen. of Hil. T. 4 W. 4, reg. 1, expressly orders, that no demurrer

(c) *Brand* v. *Rich*, 8 Taunt. 591; 2 Moore, 654, S. C.; Tidd, 452.

(d) MS. A. D. 1817, K. B.

(e) See the rule and prior practice, Jervis's Rules, 52, note (*l*), and Tidd, 344, 345, 355.

nor any pleading *subsequent* to the declaration, shall in any case be filed with any officer, but the same *shall always* be delivered between the parties; (*e*) and unquestionably the most convenient and least expensive course is that the declaration as well as all other pleadings and proceedings should be delivered directly to the opponent, which saves the loss of time, trouble, and expense, of resorting to any public office, as well as the expense of officers to be there in attendance.

When the defendant has appeared, either by himself or his attorney, and caused his appearance to be entered to serviceable process, or by putting in bail to a capias, or writ of detainer, a *copy of the declaration* must be *delivered* to the defendant's attorney or agent, or to the defendant himself, when he has appeared in person, if his residence be known; but when he has appeared by attorney, whose residence is known, or may be readily ascertained, it would be irregular to deliver the declaration to the defendant himself. (*f*) If the abode of the defendant's attorney be unknown, then such copy may be left with the clerk of the declarations, and notice thereof given to the defendant himself or his attorney. (*g*)

4. Declaration in what cases to be *filed* and *notice* thereof given.

When the defendant has not caused his appearance to be entered, or in a bailable case has not put in bail above, then, as it is not presumed that the plaintiff knows the residence of the defendant, or who he intends to employ as his attorney, the declaration *may* and indeed *must be filed*, viz. in the King's Bench, in the office of the clerk of the declarations, in the Common Pleas, with the prothonotary, and in the Exchequer with the filacer. (*h*)

5. Notice of declaration when filed.

Whenever a declaration has been regularly filed, *notice* thereof and of its having been so filed must be given to the defendant, by leaving such notice at his present, or, by leave of the Court, last place of abode, (*i*) and a separate notice must in like manner be delivered for each defendant, where there are several. (*k*) The Gen. Reg. Hil. T. 2 W. 4, r. 49, orders that "where the residence of a defendant is unknown, *notice* of declaration may be stuck up in the office;" but the rule is

(*e*) And see previous practice, Jervis's Rules, 87, n. (*a*).

(*f*) Lofft, 332; 1 Arch. K. B. 4th ed. 226, 227.

(*g*) R. T. 2 G. 2, R. T. 12 W. 3; *Hindford* v. *Charteris*, 2 Ld. Raym. 1407; Tidd, 452; 1 Arch. K. B. 227.

(*h*) R. T. 1 G. 2, K. B.; R. M. 1 G. 2, C. P.; 1 Arch. K. B. 227.

(*i*) R. T. 1 G. 2, K. B.; R. E. 49 G. 3; R. M. 1 G. 2, C. P.; *Watson* v. *Delcroix*, 2 Dowl. 396; 4 Tyr. 266, S. C.

(*k*) *Coulson* v. *Turnball*, Barnes, 246; *Kingdon* v. *Horn*, Barnes, 293.

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thus qualified, "*but not without previous leave of the Court*:" (*l*) and such application must precede the delivery of the declaration, and therefore where the plaintiff's attorney, not knowing to where the defendant had removed, left the declaration at his last residence, the Court on subsequent motion refused to make a rule declaring such antecedent service good; (*m*) and it has been questioned whether a single judge at chambers can give such leave; (*n*) and upon an application to the Court, they require an affidavit, showing that very diligent and frequent inquiries, and what in particular, for one alone will not suffice, have been made after the defendant, in order to deliver such notice to him personally. (*o*) But the rule giving such leave is absolute in the first instance. (*p*) If it appear that the notice has been left at the defendant's present residence, or there is reasonable ground to believe that the defendant has had actual knowledge of the notice of declaration, there is then no occasion to apply to the Court for leave to stick up the notice in the office, (*q*) although to avoid the risk of the defendant's afterwards moving the Court, on the ground that he had no intimation of the notice, the safest course is to apply to the Court for leave to stick up the notice in the office. Where in the service of a notice of declaration the probabilities are that it has come to the hands of the defendant, and the latter does not deny that it had come to his knowledge, the Court will not set aside the service. (*r*)

6. Requisites of such notice of declaration when filed. (*s*)

Notwithstanding the practical proceedings in an action have in other respects been materially changed by the recent enactments and rules, yet the *form* and *requisites* of a *notice of de-*

(*l*) *Watson* v. *Delcroix*, 2 Dowl. 396; 2 Cromp. & M. 425. In *Martin* v. *Colvill*, 2 Dowl. 694, it was ordered that service of declaration should be deemed sufficient, by leaving it at the *last* place of residence of defendant, and *sticking it up* in the Exchequer Office, where the defendant had removed since service of the summons, but the Court refused to make a prospective order as to subsequent proceedings; and see *Cornish* v. *King*, 3 Tyr. 575, *ante*, vol. iii. 320, note (*b*).

(*m*) *Troughton* v. *Craven*, 3 Dowl. 436.

(*n*) 1 Arch. K. B. 4th ed. 227.

(*o*) *Id. ib.*; *Fry* v. *Rogers*, 2 Dowl. 412; *Heming* v. *Drake*, *id.* 637; see form of affidavit T. Chitty's Forms, 108. In addition to the usual form of affidavit it is suggested that deponent should swear to a search in the Directory, and at general or local post offices, and at any public offices with which it may be supposed that the defendant was connected; and see suggestion, *ante*, vol. iii. Chap. VII. as to proceedings on distringas, and Chitty on Bills, 8th ed. as to diligent inquiries.

(*p*) *Bridger* v. *Austin*, 1 M. & Scott, 520; 1 Dowl. 272, S. C.

(*q*) *The Mayor and Burgesses of Derby* v. *Wheeldon*, 9 Price, 150; see further as to the service of the notice of declaration, 1 Arch. K. B. 4th ed. 228.

(*r*) *Rolfe* v. *Brown*, 3 Dowl. 628; and see same principle as regards service of process, *ante*, vol. iii. 272.

(*s*) As to this notice, when the *notice to plead* is incorporated therein, see further next chapter "Notice to plead."

claration having been filed continue the same, excepting that the Reg. Gen. 2 W. 4, r. 41, directs that "it shall not be "deemed necessary in a notice of declaration to express the "amount of the damages laid at the conclusion of the declara-"tion." (*t*) The form and requisites in other respects depend on separate rules of each of the Courts, now comparatively ancient. The rule Trin. T. 1 G. 2, A. D. 1727, of the King's Bench, *professedly* by its recital made to establish the practice of the Court of King's Bench, upon the stat. 12 G. 1, c. 29, ordered that "in all causes where a copy of the process of "that Court shall be served upon any defendant, and an ap-"pearance entered, or common bail filed for such defendant "by the plaintiff's attorney, pursuant to the said act, the "plaintiff's attorney in such case shall leave a copy of the de-"claration in the office, with the proper officer appointed for "that purpose, and also *give notice thereof to the defendant*, "by delivering an English notice, written in secretary hand, "to such defendant, or by leaving the same at the last or most "usual place of abode of such defendant; in which notice "shall be likewise expressed, *the nature of the action*, and at "*whose suit* prosecuted, and the *time* limited by the rules of "Court for such defendant to plead to such action; and that "in case such defendant do not plead to such declaration by "such limited time, so to be expressed in such notice, judg-"ment shall be entered against such defendant by default, and "from the time of giving such notice as aforesaid, such decla-"ration shall be deemed well delivered to such defendant, and "not otherwise: and in case such defendant, after such notice "given, do not plead by the time the rules for pleading are "out, the plaintiff in such case may sign his judgment, *without* "*any other or further calling for a plea;* and thereon give "notice of his executing his writ of inquiry, either by deliver-"ing a notice in writing to such defendant, or by leaving the "same at the last or most usual place of abode of such de-"fendant, which shall be a sufficient notice to such defendant "of the time of executing such writ of inquiry."

In the following Mich. T. 1 G. 2, A. D. 1727, a rule nearly similar, and enjoining the same form of notice, was promulgated for the *Common Pleas;* and the practice is now the same in the Exchequer. (*u*)

Irregularities or

Although perhaps on principle a defendant, on receiving

(*t*) Not previously necessary in C. P. *Hetherington* v. *Hobson*, 6 Taunt. 331; Tidd, 457; Jervis's Rules, 53, note (*q*).

(*u*) Price P. 249, 250, note*.

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imperfections in notice of declarations when and how objected to.

any notice that a declaration has been filed in the cause in the proper office ought to enquire there, and obtain a copy, and thereby learn all necessary particulars, and not be allowed to take advantage of any want of particularity in the notice, yet it has been held that, if the notice of declaration irregularly *vary* from the writ in the *number* or names of the parties,(*x*) or in the description of the *form of action* from that named in the writ, the notice will be irregular; and the same, and all proceedings thereon, may, on summons or motion, in due time, be set aside;(*y*) as where the writ of summons was "trespass on the case *upon promises*," and the notice of declaration was "in an action of trespass on the case," omitting promises.(*y*) It was formerly held that a notice of declaration must be dated,(*z*) but the contrary was afterwards determined;(*a*) and as by the terms of the rules prescribing the requisites of the notice, the same, as well as the declaration, begin to operate only from the delivery of the notice, it would seem that a date, though usual, is immaterial when the declaration has been filed de bene esse; which we have seen it can now only be on bailable process on or after the eighth day after the arrest. The notice should state that it has been so filed as in the subscribed form; but if omitted, the Courts nevertheless have held the notice sufficient.(*b*) The *usual form* of such notice is subscribed.

7. *Time* within which *defendant must plead* to be stated in notice of declaration filed.

As respects the *time for pleading*, it must, according to the directions in the above rules, be accurately stated in the notice, and if it give the defendant *less time* than he is entitled to, would be bad;(*c*) though if it give the defendant more time than was necessary, it will be binding on the plaintiff.(*d*)

(*x*) *Evans* v. *Whitehead*, 2 M. & R. 367.

(*y*) *Ante*, vol. iii. 197, note (*x*), 228, note (*p*); *King* v. *Skiffington*, 1 Cr. & M. 363; 3 Tyrw. 318; 1 Dowl. 686, S. C.; *Robins* v. *Richards*, 1 Dowl. 376; *Cook* v. *Johnson*, 1 M. & Scott, 115; 1 Dowl. 247, S. C.; *Graves* v. *Urse*, 2 Wils. 84; and see the older cases, 1 Sellon Pra. 248, 252; Tidd, 452, 457, *id.* Supp. A. D. 1833, p. 123; Chapman, K. B., 2 Add. 106; 1 Arch. K. B., 4 ed. 228, 229.

(*z*) *Cromwell* v. *Goodwin*, Barnes, 409, P. R. 134; cited in Sell. Pr. 250; *Anonymous*, 2 Chitty's Rep. 238.

(*a*) *Anonymous*, 2 Chit. R. 238.

(*b*) *Cort* v. *Jaques*, 8 T. R. 77; *Watkins* v. *Wooley*, 8 Taunt. 644; 2 Moore, 719, S. C.

(*c*) 1 Sellon Pr. 250, cites P. R. 135. When a notice to plead was *indorsed* on declaration delivered, and was in blank as to the time when defendant was to plead, it was held sufficient, as defendant was bound to know or ascertain the proper time. *Hifferman* v. *Langelle*, 2 Bos. & P. 363; and see *Doe* v. *Roe*, 1 Tyrw. 280, *sed quære*.

(*d*) *Solomonson* v. *Parker*, 2 Dowl. 405.

8. Notice of declaration having been *filed* on serviceable process, *and to plead* in K. B., or C. P., or

In the K. B. [*or* ".C. P." *or* "Exchequer of Pleas."]

Between { A. B., Plaintiff, and C. D., Defendant. }

Take notice that a declaration was this day [*or* "on the —— day of —— last" *or* "instant"] filed with the clerk of the declarations in the King's Bench Office, [*or in* C. P. "with the prothonotaries, at their office in Tanfield Court,"] in the Inner Tem-

This depends on ancient rules in the respective Courts, similar to each other in effect. The time is *four days* when the venue is laid in London or Middlesex, *and* the defendant resides within twenty miles of London, and *eight days* if the venue be in any other county, *or* the defendant resides above twenty miles from London.(*e*) The notice of declaration, as respects the time for pleading, is deemed filed only from the time of the service of the notice;(*f*) and therefore a rule to plead before service of notice of declaration would be irregular.(*g*) If any notice of declaration is received or communicated to the defendant, he must, if it be defective, apply within a reasonable time to set it aside; and if he neglect so to do, and the plaintiff sign judgment for want of a plea, the Court will not afterwards set aside the judgment in respect of any objection to such notice.(*h*)

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10. Of declaring by the bye.

It has been supposed by high authority that the same plaintiff may still declare *by the bye* after the defendant has appeared, viz. may deliver another distinct declaration for a different cause of action from that expressed in the process

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Exchequer, where the plaintiff has entered an appearance for defendant sec. stat.

ple, London, [*or in Exchequer*, " filed in the Office of Pleas of the said Court, situate in Lincoln's Inn, in the county of Middlesex,] against you, at the suit of the above-named plaintiff, in an action upon promises, [*or* " of debt for ——" *or as the action is*,] and unless you plead thereto in four [*or* " eight," *depending on facts, as in context, and post, Time of Pleadings*] days from the date hereof [*in Exchequer more properly the form runs* " service hereof"] judgment will be signed [*in Exchequer say* " entered"] against you by default. Dated this —— day of —— A. D. 1835.

Yours, &c.
Plaintiff's Attorney, [*or* " Agent."]

To Mr. ——, the above-named Defendant.

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9. The like, de bene esse, on bailable process.

In the K. B. [*or* " C. P." *or* " Exchequer of Pleas."]

Between { A. B., Plaintiff, and C. D., Defendant.

Take notice that a declaration was this day [*or* " on the —— day of —— last," *or* " instant"] filed with the clerk of the declarations in the King's Bench Office, [*or in C. P.* " with the prothonotaries at their office in Tanfield Court,] in the Inner Temple, London, [*or in Exchequer*, " filed with the filacer, in the Office of Pleas of the said Court, situate in Lincoln's Inn, in the county of Middlesex,] *conditionally, until special bail be put in* and perfected, [*or if already put in, say* only " perfected"] against you, at the suit of the above-named plaintiff, in an action upon promises [*or* " of debt for £——," *or as the action is*;] and unless you appear and plead thereto in four [*or* " eight," *as the case may require, see* context, supra] days, judgment will be signed [*or in Exchequer say* " entered"] against you by default. Dated, &c.

(*e*) See in K. B. Reg. Trin. T. 5 & 6 G. 2, and *Holland* v. *Cook*, 1 M. & Selw. 566; in C. P. Reg. Mich. T. 3 G. 2; Reg. E. 3 G. 2; Reg. Hil. 35 G. 3; in Exch. Reg. Mich. 5 G. 3; and Reg. Trin. 26 G. 3; Reg. Mich. T. 1 W. 4, r. 11; Jervis's Rules, 10; Man. Exch. Pr. 200; Price Pr. 214, 225.

(*f*) In K. B. Reg. Trin. 1 G. 2; Reg. Trin. 2 G. 2; in C. P. Reg. East. 49 G. 3, Reg. Mich. 1 G. 2; 7 T. R. 298; *Weddle* v. *Brazier*, 1 Cr. & M. 69; 1 Dowl. 639; see rules, *ante*, 493.

(*g*) *Grey* v. *Saunders*, Barnes, 248; *Worley* v. *Lee*, 2 T. R. 112.

(*h*) *Smith* v. *Clarke*, 2 Dowl. 218.

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without any particular process to support such declaration, and thus save the delay, trouble, and expense of issuing a writ in such collateral action; (i) it is however stated that it is in general agreed that no *other person* except the original plaintiff can declare by the bye in any case. (i) And as other authors appear to think that the practice of declaring by the bye has, in effect, been *entirely determined*, the safest course will be for even the original plaintiff to issue a fresh writ for another cause of action, which it may not be advisable to attempt to include in his first action. The permitting a plaintiff, and still less a third person, to subject a defendant to the expense of a second or third, or even more declarations, without any previous writ or notice, according to the previous practice, seems, on principle, to have been so objectionable, that it is to be hoped that it will not be revived.



SECT. VII.—OF ACCOMPANYING PARTICULARS OF PLAINTIFF'S DEMAND WHEN REQUISITE.

VII. *Of accompanying particulars of plaintiff's demand when requisite.*

The Reg. Gen. of Trin. T. 1 W. 4, r. 6, presently more fully stated, requires that when a declaration, containing an *indebitatus*, or *common count in assumpsit or debt*, is *delivered*, then *with such declaration* certain particulars of demand shall at the same time be delivered. But if the declaration *be filed*, then such particulars shall accompany the notice of declaration so filed. (j) It will be more convenient to consider the requisites of these particulars when we examine the subject of particulars of the plaintiff's demand in general.

(i) Tidd, Supp. A. D. 1833, p. 120; Atherton on Personal Actions, 103, 106. But see Petersdorff's Plead. p. 20, and 1 T. Chitty's Archbold, K. B. 4th edit. 220; 1 Archb. C. P. [68], where it seems to be supposed that even the *same* plaintiff cannot now declare by the bye.

(j) See further, *post*, Particulars.



CHAPTER XVI.

OF PROCEEDINGS TO COMPEL DEFENDANT TO PLEAD, VIZ. NOTICE TO PLEAD, RULE TO PLEAD, AND DEMAND OF PLEA.

CHAP. XVI. COMPELLING DEFENDANT TO PLEAD.

In general the notice to plead is given at the same time as the declaration is delivered, and indorsed thereon; or when the declaration is filed, and notice thereof is given, the notice to plead is incorporated in the notice of such filing, and the rule to plead when necessary is immediately entered, and demand of plea made; and therefore most authors have considered the notice to plead, rule to plead, and demand, in the same chapter with the practice relating to declarations. But a plaintiff may adopt all those proceedings separately; and when he is reluctant to declare, or otherwise expedite his suit, he may purposely delay giving the notice to plead, &c. until he is ready to proceed; and in those cases the only course for a defendant, anxious to expedite the suit, is to plead, as he may do without notice, rule, or demand: and then the plaintiff, when ruled to reply, must do so. We will therefore in this chapter examine the notice to plead, rule to plead, and demand of plea, separately.

Proceedings to *compel a defendant to plead*, or to enable plaintiff to sign judgment for want of a plea in general.

It has been observed,(*a*) that the law is so careful to prevent a plaintiff from taking any undue advantage of a defendant, by obtaining a judgment against him *unawares*,(*b*) that it not only *absolutely allows* a certain time to plead to the declaration, but it *obliges* the plaintiff to give the defendant *three*

(*a*) 1 Sellon's Prac. 335.

(*b*) But still if a defendant inadvertently delivers a plea without signature of counsel, or a plea in abatement without affidavit of the truth, plaintiff may treat same as a nullity, and sign judgment, and in debt issue execution without notice, a practice which it is submitted requires alteration.

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warnings before he can sign judgment for want of a plea; viz. 1st, a *due written notice* to plead; 2ndly, *to serve him with a rule to plead;*(c) and 3dly, if the defendant still neglects to plead, the plaintiff must *then* make a *formal demand in writing* of a plea, at least twenty-four hours before judgment can be signed, and *afterwards search* the office(d) to see if one has been put in, before he can sign judgment; so that there must be no less than *three regular notices or warnings* given to the defendant to defend himself.(e) As in general, lex neminem cogit aut vana aut absurdam, it is probable that originally the notice to plead, rule to plead, and demand of plea, were designed as *progressive*, or at least substantial *distinct* notices, and cautions to be given to a defendant at *different times* of the necessity for his pleading; but it has been objected, that *now* all the three proceedings, to use an homely expression, are nearly jumbled together, or are concurrent; and, even by a recent rule, " a demand of plea " may be given at the same time as the declaration is delivered, " and even indorsed thereon;"(f) whilst in other parts of the practice warnings of this nature, as in the instance of a rule to declare and a demand of replication, have been abolished as useless proceedings, occasioning unnecessary expense.

I. OF THE NOTICE TO PLEAD.

I. NOTICE TO PLEAD.—A *notice* to the defendant, requiring him to plead, seems to have been considered requisite *in all cases* before a judgment can be signed for want of a plea. (g) But it was recently decided, that in the case of a *prisoner*, when he has been *served* with a rule to plead, the omission of an *indorsement* of notice to plead on the declaration, would not render irregular a judgment signed for want of a plea; and the Court said it was the daily practice for declarations against *prisoners* to be delivered without any indorsement of notice to plead; (h) and it has recently been decided, that if a declaration be amended, and even new counts added, it is not necessary afterwards to give a *fresh notice* to plead, or new rule to plead. (i) By the terms of the rules of K. B. they seem not to

(c) 1 Sellon's Prac. 335; but see *post*, 504, as to the *service* of any rule to plead.

(d) But now, by Reg. Gen. all pleadings should be *delivered*, and not *entered* or filed at any public office.

(e) 1 Sellon's Prac. 335. But see *post*, 504, that it is at least at present unnecessary to *serve* a copy of the rule to plead.

(f) Reg. Gen. Hil. T. 3 W. 4, r. 43.

(g) *Heath* v. *Rose*, 2 New R. 223.

(h) *Clementson* v. *Williamson*, 1 Bing. New C. 336. *Sed quære*, for it would seem on principle that a *prisoner*, usually less able to pay for advice, ought to have more distinct notice and warning than defendants at large.

(i) *Fagg* v. *Borsley*, 2 Dowl. 107; and see *Mould* v. *Murphy*, 3 Tyrw. 538, and *Usborne* v. *Pennell*, 1 Bing. N. C. 320, as to a new rule to plead not being necessary.

require the defendant to plead at all, unless the plaintiff has given him a *notice to plead*, specifying correctly the time within which he ought to plead, and that therefore if such notice *to plead* be delayed, the defendant's time to plead would be indefinite; (*k*) and although the first rule in C. P. of Mich. T. 3 Geo. 2, seemed in terms to require the defendant to plead in four or eight days after declaration, according to the venue therein and residence of the defendant, without any notice to plead, (*l*) yet a subsequent rule equally requires such notice as in K. B.; (*m*) and yet it was held in one case in C. P., that where the declaration was indorsed with a notice to plead in blank, as thus, "to plead in ——," it was sufficient, because it should be understood to mean within the number of days well known to be allowed by the rules of the Court; (*n*) but that decision seems contrary to the rule, and a departure from principle. (*n*)

What time to plead should be stated in the notice.

When the declaration is *delivered absolutely*, either after the defendant's appearance, or after appearance entered for him by the plaintiff, or after bail above has been put in and perfected, or put in but not excepted to, then, "if the venue "be laid in London or Middlesex, and the defendant reside "within twenty miles of London, he must plead within *four* "*days*, and if the venue be laid in any other county, *or* the de-"fendant reside above twenty miles from London, then within "*eight days*, and in default of so pleading the plaintiff may "sign judgment." (*o*) The four or eight days for pleading are reckoned exclusive of the day of *giving* (i. e. delivery of) *the notice*, and inclusive of the last day, unless that be a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case they are to be reckoned exclusively of that day also, so that the defendant then also has all the next day. (*p*)

When a declaration is *delivered de bene esse*, or conditionally (as we have seen it may on *bailable* process on or after the eighth day inclusive after the arrest, and before bail have perfected,) the notice to plead must give precisely the same number of days to plead, (viz. four or eight, depending on venue and the defendant's residence,) as when a declaration is

(*k*) See in K. B. Reg. Trin. 1 G. 2, and Trin. 5 & 6 G. 2, Mich. T. 10 G. 2.

(*l*) In C. P. Mich. T. 3 G. 2; Easter T. 3 G. 2; Hil. T. 35 G. 3.

(*m*) In C. P. Reg. Easter T. 3 G. 2.

(*n*) *Hiffermann* v. *Langelle*, 2 B. & P. 363; and yet the rule of Easter Term, 3 G. 2, in C. P. seems expressly to require the notice to plead to *specify the time*, viz. *four* or eight days. See *post*, 500, note (*e*.)

(*o*) In K. B. Reg. Trin. 5 & 6 G. 2; in C. P. Reg. East. T. 3 G. 2; and see *Holland* v. *Cook*, 1 M. & Sel. 566; in Exch. Reg. Mich. T. 1 W. 4, rule 11.

(*p*) See Reg. Gen. Hil. T. 2 W. 4, r. 8; *ante*, vol. iii. 110.

CHAP. XVI. Compelling Defendant to plead.

delivered absolutely, (*q*) and it expires at the same time, so the defendant's time for pleading is immediately current whilst he is proceeding to justify his bail. In that case, however, the defendant must put in, and if excepted to, perfect his bail before he can regularly plead in *bar*, (*r*) though he must, if at all, plead in *abatement* before justification, within four days inclusive. (*s*)

As the *defendant* best knows whether he *resides* within twenty miles of London, it should seem that when the venue is laid in London or Middlesex, it would be reasonable that the practice should require him to plead within the four or eight days, according to the fact of his residence, without the time being specified in the notice to plead, and perhaps that was the ground on which the before-mentioned decision in C. P. proceeded. (*t*) There is not, however, any decision in K. B. to that effect, and therefore the safest practice is to specify the time in the notice; and if it be doubtful whether the defendant's residence is beyond twenty miles from London, to allow him the full eight days; for we have seen that if the notice give the defendant *too little time*, it will be bad; (*u*) though if *more time* be given than was necessary, the defendant is entitled to the whole time, as stated in the notice. (*x*) Where a defendant had been arrested in London, but usually resided in Scotland, the Court held that four day's notice sufficed; (*y*) and an attorney, in respect of his supposed attendance in the Courts at Westminster, must in all cases plead within four days, although the venue be not laid in London or Middlesex, and he reside above twenty miles from London. (*z*) In the Exchequer, as a judgment cannot be signed in that Court till the afternoon of the fifth day, and the office is not open in vacation in the afternoon, the defendant has in effect, in vacation, *five* clear days to plead, unless the plaintiff's attorney will incur the extra expense of opening the office in the afternoon of the fifth day, for the purpose of signing judgment. (*a*)

Where a declaration has been *filed*, and notice thereof given, the notice to plead when given, and usually inserted in *such notice of declaration*, is to be four or eight days, depending as above on venue and the defendant's residence, but the

(*q*) In K. B. Reg. Trin. 22 G. 3; 1 Arch. K. B. 231.

(*r*) *Venn* v. *Calvert*, 4 T. R. 578.

(*s*) *Hopkinson* v. *Henry*, 13 East, 170; *Saunders* v. *Owen*, 2 Dowl. & R. 252; *Capen* v. *Bond*, 2 Young & J. 531.

(*t*) *Ante*, 499, note (*y*).

(*u*) *Ante*, 494, note (*c*).

(*x*) *Solomonson* v. *Parker*, 2 Dowl. 405.

(*y*) *Douglas* v. *Ray*, 4 T. R. 553, note.

(*z*) *Mann* v. *Fletcher*, 5 T. R. 369.

(*a*) *Kemp* v. *Fyson*, 3 Dowl. 265; and *post*, Time of Pleading.

days are reckoned exclusive of that on which the *notice* was given, and not from the time of filing the declaration. (*b*)

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Neither a declaration nor a notice to plead can be delivered between the 10th August and 24th October, all proceedings in an action being expressly suspended during that time by the 2 W. 4, c. 39, sect. 11; (*c*) and if the time for pleading expire during those days, the defendant has as much time to plead after the 24th October as he had on the 10th August, though it will not be necessary to give a fresh rule to plead; (*d*) and the same rule extends to *enlarged time* to plead, obtained by a judge's order, unless terms to the contrary be expressly imposed by a qualified order. (*e*)

How long the plaintiff may delay serving a notice to plead.

If a plaintiff think fit, he may, as regards the time of giving it, always *delay delivering or giving it an indefinite time*; (*f*) and he may deliver notice to plead on a *separate paper* subsequent to the declaration, or delay giving notice to plead when his declaration has been filed until any indefinite time afterwards, (*f*) and this in some cases is advisable, as where the plaintiff is not prepared to proceed to trial, and it is therefore desirable to obtain some time before he can be ruled to enter the issue. The defendant, however, may plead *voluntarily* at any time after the declaration has been delivered or filed, without waiting for a notice to plead, rule to plead, or demand of plea. If a plaintiff delay delivering his notice to plead until after four terms have expired since the delivery or filing of his declaration, then he must give the defendant *an entire term's notice to plead*, unless the action has been stayed by injunction or other proceeding on the part of the defendant. (*g*) It suffices to give such term's notice at any instant before the *first day* of a term, and a rule to plead may be *entered* at any time in the next vacation. (*h*)

Mode or form of giving the notice to plead.

With respect to the *modes* or forms of giving the notice to plead, when a declaration is *delivered absolutely*, it is usual to *indorse* the notice on the front outside of such declaration, in

(*b*) *Hutchinson* v. *Brown*, 7 T. R. 298; *Weddle* v. *Brown*, 1 Cromp. & M. 69, and *ante*, 494, 495.

(*c*) See Statute, *ante*, vol. iii. 152, in note; and *id.* 96, 97, as to the construction of that rather obscure enactment. *Semble*, the notice to plead, though delivered immediately before the 10th August, need not vary from the usual form.

(*d*) Reg. Gen. Mich. T. 3 W. 4, r. 12.

(*e*) *Wilson* v. *Bradslocke*, 2 Dowl. 416; *Trinder* v. *Smedley*, 3 Dowl. 87.

(*f*) *Anonymous*, 2 Wils. 137; *West* v. *Radford*, 3 Burr. 1452.

(*g*) Reg. Trin. 5 & 6 G. 2; *Haley* v. *Riley*, 1 Dougl. 72; *Bland* v. *Darley*, 3 T. R. 530. In 1 Arch. Prac. C. P. [77], it is suggested that if plaintiff delay declaring to a subsequent term, and defendant duly appear, the defendant may still be entitled to an imparlance; *sed quære*, if there is now an imparlance in any case of a *personal* action.

(*h*) *Price* v. *Hughes*, 1 Dowl. 448; *Milbourne* v. *Nixon*, 2 T. R. 40.

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these words, "*The defendant is to plead hereto in four* [or "'*eight*'] *days, otherwise judgment.*" And when a declaration is *delivered* conditionally in a bailable case, the form is thus *indorsed*, "*This declaration is delivered conditionally until* "*special bail be put in and perfected,* (or if already put in, then "only the latter,) *and the defendant is to plead hereto in four* [or "'*eight*'] *days, otherwise judgment.*" If the declaration has already been delivered absolutely, without any notice to plead *indorsed*, then in due time before signing judgment the plaintiff must deliver on a *separate paper* a notice to plead, intituled in the Court and fully in the cause, with the names of the parties, and referring to the declaration previously delivered, and requiring the defendant to plead within the proper specified number of days, as in the *subscribed form*, and in such a case it would be advisable to *date* the notice and serve it on the day of such date.

We have seen that when a declaration has been regularly *filed* in the proper office of one of the Courts, notice of such filing is to be given, and it is then usual, though not necessary in the *same* notice, to give the defendant notice to plead. (*i*) But the latter notice might be *subsequently* given on a separate paper, and as in the subscribed form. (*k*)

SECT. II.—RULE TO PLEAD.

Rule to plead (*l*) when necessary.

The former practice relating to the *rule to plead* continues unaltered, excepting that the Reg. Gen. Hil. T. 2 W. 4, r. 42, declares, that in all the Courts, "where an amendment of "the declaration is allowed, no new rule to plead shall be "deemed necessary, whether such amendment be made of the

(*i*) *Ante*, 494, 495, in notes, where see a form.

Form of a detached or separate notice to plead.

(*k*) In the Court of ——.

Between { A. B., plaintiff, and C. D., defendant,

Take notice, that the defendant is hereby required to plead to the declaration in this cause already delivered, [*or, if filed*, "of the filing whereof in the office of —— you already have had notice,"] in four [*or* "eight"] days from the day of your receiving this notice, otherwise judgment. Dated this —— day of ——, A.D. ——.

To Mr. C. D., the above named defendant, and Mr. G. H., his attorney.

Yours, &c.
E. F.,
Plaintiff's attorney.

(*l*) See former practice fully, 1 Sellon's Pra. 1st edit. 335—338; Tidd, 9th edit. 473—475; 1 Arch. K. B. 4th edit. 234, 235; 1 Arch. C. P. 106, 107.

"same term as the declaration or of a different term."(m) Before that rule it was decided in the Common Pleas, that where the declaration had been delivered in a prior term or vacation judgment might be signed in the following term, without giving a new rule to plead of the term of which the judgment was signed,(n) and if the proceedings had been stayed at the request of the defendant, then also no fresh rule to plead of a subsequent term was necessary before judgment.(n) Another implied alteration is, that though previously a rule to plead could only be entered in term time,(o) yet, since the 2 W. 4, c. 39, authorizes all proceedings to judgment and execution *during the vacations*, such rule may be entered in vacation, excepting between the 10th of August and 24th of October.

This rule must be *entered* by the proper officer in a book kept for that particular purpose, in all cases, whether the defendant has appeared or the plaintiff has entered an appearance for him, except the defendant be under terms by rule or judge's order actually drawn up to plead within a fixed time, when the giving any rule to plead is considered to have been dispensed with;(p) and, although it has been decided otherwise,(q) yet even a mere summons for time, upon which no order has been made, dispenses with the necessity for giving a rule.(r)

Time of *entering rule to plead.*

We learn historically that the notice to plead, rule to plead, and demand of plea, were anciently *successively* given, and not, as at present, crowded together and current at the same time. But now the three may be given nearly at the same time, so as to be all current together, and, in a great measure, defeat the original object in requiring them. The *notice to plead* ought, however, to precede or, at least, *not be subsequent*, to the rule or demand of plea. The rule, which expires in four days exclusive, may be *entered* on or after the day on which the declaration is delivered or filed, and should, at all events, be given so as to expire *before* or on the same day as the time for pleading expires, so as to enable the plaintiff to sign judgment on the following day. Correctly, the rule ought to be given before *demand of plea*, and, on that account, in the Common Pleas, it was necessary to wait twenty-four hours after the rule had expired.(s) But in the King's Bench the rule may be entered after demand

(m) See the rule and the alterations it effected in practice, Jervis's Rules, 53, note (r).

(n) *Usbone* v. *Pennell*, 1 Bing. N. C. 320; *Mould* v. *Murphy*, 3 Tyrw. 538; 2 Dowl. 54, S. C.; *Pryer* v. *Smith*, 2 Dowl. 114.

(o) *Pryer* v. *Smith*, 1 Cr. & M. 855; 2 Dowl. 114.

(p) *Nias* v. *Spratley*, 4 Bar. & Cres. 386; *Donne* v. *Marsh*, 7 Taunt. 587.

(q) *Dicker* v. *Shedden*, 3 Bos. & P. 180.

(r) *Nugee* v. *M'Donell*, 3 Dowl. 579.

(s) *Hewit* v. *Palmer*, 4 Taunt. 51; Impey's C. P. 280; Sellon's Pra. 359.

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of plea. (t) The rule to plead, however, must not be entered or served before notice of declaration, or it would be void. (u)

Mode of ruling to plead.

In order to enter a rule to plead, the practice is to make out a *precipe* or memorandum on plain paper, as *instructions* to the officer, in the subscribed form, but *dated* of the day of the month and year when entered. (x) This is to be taken to the proper officer, viz. in King's Bench, to the Clerk of the Rules, or in Common Pleas, to the Secondary, or in Exchequer, to the Clerk of the Rules, who enters it in a book kept for that purpose, and draws up the rule itself on paper in the subscribed form. (y) It is a four day rule, *exclusive* of the day of giving it. (z) It seems that there is not any necessity for *serving* any copy of this rule on the defendant, or his attorney, (a) but the defendant is bound to *search* the proper office, which he should do just before his ordinary time for pleading has expired; and if, when necessary, no rule has been entered, the defendant need not plead till a regular rule has been entered, and is about to expire. (b)

Inutility of this proceeding.

As a rule to plead is not served, nor is, in fact, any notice thereof, or warning, *communicated* to a defendant, (excepting when he searches the proper offices to ascertain whether any such rule has been entered,) its only utility can be as a formal intimation in a public book that, unless the defendant pleads in

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(t) *Maxwell* v. *Skerrett*, 5 East, 547; and see Tidd, 9th edit. *id.* Suppl. A.D. 1833; 1 Arch. K. B. 4th edit. 234, 235.

(u) *Grey* v. *Saunders*, Barnes, 248.

(x) Impey, K. B. 312; I. C. P. 278; 1 Sellon's Pra. 335, 1st edit. The form is thus:—

Form of precipe or memorandum, as instructions for rule to plead.

In the K. B., [*or* "C. P.," *or* "Exchequer of Pleas."]

B. v. D. } Rule to plead.

E. F., Plaintiff's attorney, [*or* "agent,"] —— day of June, A.D. 1835.

(y) See form, 1 Sellon's Pra. 335, 1st edit.:—

Form of entry of rule to plead.

B. v. D. } Unless the defendant shall plead within four [*or* "eight"] days, let judgment be entered for the plaintiff.

By the Court.

(z) *Quære*, in C. P. *inclusive*, R. M. 1654, r. 15; 1 Arch. C. P. 107; but now see Reg. Gen. Hil. T. 2 W. 4, reg. 8, where the first day is to be excluded in all cases; 1 Arch. K. B. 4th edit. 235.

(a) "The rule is merely *entered*, *not served*," 1 Arch. C. P. 107. But see 1 Sellon's Pra. 335, that the rule should be served. N. B. The case *Pound* v. *Lewis*, 2 Dowl. 744; 3 M. & Scott, 210, S. C., only applies to the *service* of a *rule* to *reply*, or respecting *subsequent* pleading pursuant to express directions of Reg. Gen. Hil. T. 2 W. 4, r. 54.

(b) Tidd, 9th edit. 483; 1 Arch. C. P. 107; but see 1 Sellon's Pra. 335, that the rule must be served.

due time, the plaintiff intends to sign judgment against him; and which seems to be a proceeding wholly unnecessary *in addition* to the notice to plead and demand of plea, and might well be dispensed with. CHAP. XVI. COMPELLING DEFENDANT TO PLEAD.

SECT. III.—OF THE DEMAND OF PLEA.

III. Of the demand of plea.(c)

The practice as regards the *demand of a plea* has been altered by the late *Reg. Gen.* Hil. T. 2 W. 4, r. 43, and by the subsequent Reg. Gen. Trin. T. 3 W. 4, r. 2, and by Reg. Gen. Hil. T. 2 W. 4, r. 66. The former rule declares, that "a *demand* of plea may, in all the Courts, be made at the time "when the declaration is delivered, and may be indorsed "thereon," thus assimilating the practice of Common Pleas and Exchequer to the former practice in King's Bench.(d) The other rule orders, that prisoners in custody of the marshal, or warden, or a sheriff, shall plead at the same time, and under the same rules as in actions against defendants not in custody; and hence it follows, that a *demand* of plea is equally necessary when the defendant is in custody as in other cases;(e) but we have seen that, as regards a *notice to plead*, it is not necessary when the defendant is a prisoner.(f) When, in consequence of the defendant not having himself appeared in due time, *the plaintiff has entered an appearance for him sec. stat.*, no demand of plea is necessary, the rule of Trin. T. 1 Geo. 2, in King's Bench, and of Mich. T. 1 Geo. 2, in Common Pleas, having expressly declared, that in such a case a due notice of declaration, and requiring the defendant to plead in due time, having been duly served, and rule to plead given, if the defendant do not plead accordingly, the plaintiff, *without any other or further calling for a plea*, may sign his judgment;(g) and the same practice prevails in the Exchequer;(h) and if, after the plaintiff has regularly entered an appearance for the defendant, the defendant enter an appearance, and give notice of it, the plaintiff may proceed as if the second appearance

(c) See in general Tidd, 9th edit. 475; 1 Arch. K. B. 236; 1 Arch. C. P. [79], 107.

(d) Reg. Gen. Hil. T. 2 W. 4, r. 43; Tidd, 9th edit. 476; Jervis's Rules, 53, note (s). Before this recent rule it was irregular in C. P. to demand a plea at the *same time*, or by indorsement on the declaration when delivered, *Hewit* v. *Palmer*, 4 Taunt. 51.

(e) Reg. Gen. Trin. T. 3 W. 4, r. 2; it seems so to result from the terms of that rule, 1 Arch. K. B. 4th edit. 236.

(f) *Ante*, 498, note (r); *Clementson* v. *Williamson*, 1 Bing. N. C. 356, *sed quære*.

(g) In K. B. Reg. Trin. 1 G. 2, and in C. P. Reg. Mich. 1 G. 2; and see *Free* v. *Mason*, 5 Bar. & Cres. 763; *Davis* v. *Cooper*, 2 Dowl. 135.

(h) *Davis* v. *Cooper*, 2 Dowl. 135.

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had not been entered, and may sign judgment without a demand of plea.(i) Nor is any demand of plea necessary, when a defendant is under a judge's order or rule to plead within a specified time.

Time of demanding plea.

With respect to the *time* of demanding a plea, it would be a nullity if made *before appearance* has been entered by the defendant or the plaintiff for him, nor would a subsequent appearance aid the irregularity,(k) though if an attorney has undertaken to appear, but has neglected to do so, then a plea may be demanded after the time for appearance has expired, though before actual entry of appearance, because against an officer of the Court who has so undertaken, the obligation to appear is to be considered equivalent to actual appearance,(l) and, notwithstanding the above rule of Hil. T. 2 W. 4, r. 43, authorizing the indorsement of the demand of plea on the declaration when delivered, care must be observed not to waive the right to bail; and a declaration delivered absolutely, or a demand of plea indorsed thereon before bail put *in, in case* the defendant is not a prisoner, would be a waiver of bail;(m) and a demand of plea before justification would waive their justification.(n) So, *in a late case,* where the defendant on the 3d of May had removed the proceedings into King's Bench, and on the 4th of May plaintiff had ruled defendant to put in bail, and on the same day delivered a declaration indorsed, "*conditionally* until bail be *put* in and perfected, *and the plaintiff demands a plea,*" and the defendant immediately filed common bail, and pleaded the general issue, and the plaintiff then gave notice that he waived the demand of plea, and gave a rule for better bail; the Court held, that the demand of plea waived the plaintiff's right to bail, notwithstanding the declaration had been delivered conditionally.(o) So that in no case should a demand of plea be made before appearance or justification of bail; and when a plaintiff *delivers his declaration conditionally,* the demand of plea should not be *indorsed,* but should be served when necessary on the defendant's attorney after the defendant's appearance, or in a bailable action, after the bail, when excepted to have justified. It has, however, been held, that the demand may be made before a rule to plead is given.(p)

(i) *Davis* v. *Cooper,* 2 Dowl. 135.
(k) *Venn* v. *Culvert,* 4 T. R. 578; *Martin* v. *Mahony,* 5 Dowl. & R. 609.
(l) Imp. C. P. 281.
(m) Reg. Mich. 8 Ann. r. 1; *Lister* v. *Wainhouse,* Barnes, 92; 1 Sellon's Pra. 152; *Law* v. *Stevens,* 1 Dowl. 425; Jervis's Rules, 53, note (s); 1 Arch. K. B. 4th edit. 174, 236.
(n) *Id.*; *R.* v. *London,* 1 Dowl. & Ry. 163; *R.* v. *Middlesex,* 4 Dowl. & Ry. 835; 1 Arch. K. B. 4th edit. 185, 236.
(o) *Law* v. *Stephens,* 1 Dowl. 425; Jervis's Rules, 53, note (s).
(p) *Maxwell* v. *Skerett,* 5 East, 547.

When the demand expires, and judgment may be signed.

The Reg. Gen. Hil. T. 2 W. 4, r. 66, orders, that judgment for want of a plea after demand, may, in all cases, be signed at the opening of the office, in the *afternoon* of the day after that on which the demand was made, *but not before.* (q) This rule, it will be observed, no longer requires *twenty-four hours* to elapse after the demand, and avoids all calculation and difficulty as to the exact time of the delivery of the demand, so that now, if the demand be served before nine o'clock in the evening of one day, the judgment may be signed in the afternoon of the next; but as the Court of Exchequer does not, as of course, open the office in the *afternoon* during the *vacations*, the defendant, in effect, gains an entire day, unless the plaintiff will incur the extra expense of opening the office in the afternoon, on purpose to sign judgment. (r)

The form and mode of demand must be *in writing*, &c.

By an ancient rule of Common Pleas demands of declarations, *pleas*, replications, and other pleadings, were required to be by *note in writing.* (s) We have seen that when the declaration is delivered *absolutely*, the demand may be *indorsed* on the declaration, (t) and then the form is thus: "The plaintiff demands a plea herein by E. F., plaintiff's attorney," [*or* "agent."]

Form of demand.

But when the demand is made *separately*, then the form is as subscribed. (u)

Demand of plea, *how served.*

The demand, whether indorsed on the declaration or on a separate paper, must be *delivered* to the attorney or agent of the defendant; or, if the defendant has appeared in person, then delivered to him, *or left at his residence;* and it has recently been decided that it cannot, even by leave of the Court, be stuck up in the King's Bench Office, although the defendant keeps out of the way; (x) however, in another case, not adverted to when the last decision took place, where the defendant was beyond sea, and his attorney dead, a rule was made absolute,

(q) Jervis's Rules, 59, note (p); a judgment signed in the *morning* of the fifth day after the rule would be irregular; *Kemp* v. *Fyson*, 3 Dowl. 265.

(r) *Kemp* v. *Fyson*, 3 Dowl. 265.

(s) Reg. Mich. 1 Geo. 2, C. P.; and *Nott* v. *Oldfield*, 1 Wils. 154.

(t) Reg. Gen. Hil. T. 2 W. 4, r. 43, *ante*, 505.

(u) Form of separate demand of plea.

In the ——,

Between { A. B., plaintiff, and C. D., defendant.

The plaintiff demands a plea in this cause, by yours, &c.

E. F., Plaintiff's attorney, [*or* "agent."]

Dated 1st July, A.D. 1835.

To Mr. G. H., defendant's attorney, [*or* "agent."]

(x) *Anonymous*, 1 Dowl. 68.

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that a demand of plea in the office should be deemed sufficient, upon affidavit of service of the rule to show cause, on one of the defendant's bail, and that the other could not be found.(*y*) Indeed, as notice of declaration, when filed, and the defendant's residence is unknown, may by express rule be stuck up in the Public Office, *with leave of the Court,* (*z*) and as notice of motion may also, with leave, be stuck up in the office, and another copy left at the defendant's last place of residence; (*a*) there seems no reason why a demand of plea, in similar circumstances, should not be permitted to be given in the same manner.

(*y*) *Bailey* v. *Semple*, Barnes, 307; Tidd, 475.

(*z*) Reg. Gen. Hil. T. 2 W. 4, r. 49.

(*a*) *Watson* v. *Delcroix*, 2 Dowl. 396.

CHAPTER XVII.

OF IRREGULARITIES, NULLITIES, AND NON-OBSERVANCE OF MERE DIRECTORY REGULATIONS, TIMES, AND MODES OF OBJECTING TO THE SAME; — WAIVERS OF OBJECTIONS; — NOTICES OF IRREGULARITIES, AND NOTICES OF APPLICATIONS, BEFORE SUMMONS OR MOTIONS; — OF PLAINTIFF'S NOTICE OF HAVING ABANDONED HIS IRREGULAR PROCEEDING, OR HIS OFFER TO PAY COSTS; — OF AFFIDAVITS, SUMMONS AND OF JUDGE'S ORDERS; — OF MOTIONS, OF RULES NISI: — SHEWING CAUSE; — RULES ABSOLUTE; — COSTS; — ATTACHMENTS, &c.

SECT. I.—OF IRREGULARITIES, NULLITIES, NON-OBSERVANCE OF MERE DIRECTORY REGULATIONS, &c.

CHAP. XVII. SECT. I. OF IRREGULARITIES, &c.

1st. Of Irregularities in general.

1st. THE plaintiff having *declared*, the defendant must (if at all), within *a reasonable time*, and *before he himself* takes, and also before he suffers *the plaintiff to take* any other step, in the cause, avail himself of any recent *irregularity* to which he is still in a situation to object. *Irregularity* is the technical term for every defect in *practical proceedings* or the mode of conducting an action or defence as distinguishable from defects in *pleadings*, which can only be objected to by *demurrer* or motion in arrest of judgment, or by writ of error. It is a comprehensive term, including all formal objections to *practical* proceedings, and is of three descriptions, viz. *First*, Such deviations as constitute a total *nullity; Secondly*, Such defects as are mere *irregularities*, and can only be objected to within a reasonable time, and subject to certain qualifications; and,

Thirdly, The non-observance of certain rules or enactments that have been deemed merely *directory*. We have in part considered those subjects in a preceding chapter, to which reference must be had. (*a*)

An *irregularity* may arise in every stage of an action, from the affidavit to hold to bail, to the entry of satisfaction on the roll after judgment and execution. There is, therefore, no particular stage in a cause in which *this subject* can be more properly arranged or considered than in another; but as there are some applications in respect of irregularity, *that must be made immediately after the plaintiff has declared* and *before the defendant pleads*, and as the *modes* of taking advantage of an *irregularity* whether by *Affidavit*, *Summons*, and *Judge's* order, or by *Motion* to the Court, *Rule Nisi*, *Argument* thereon, &c. are much the same as in *other applications*, it seems more expedient to examine these subjects in this place than elsewhere.

2nd. When or not objectionable to take advantage of defects, &c. (*b*)

It has been objected, that much of the practice of the superior Courts is liable to the censure imputed by Bishop Burnett to the ecclesiastical Courts in his time, viz. "*They have* but *little practice, but contrive to make the most thereof withall;*" because even the *smallest irregularity* or deviation from the strictly prescribed practice, however immaterial to the merits, too frequently becomes the subject of vexatious, dilatory, and expensive proceedings, when, if the party complaining of the irregularity or seeking any other object, were *always first compelled* to apply to his opponent to rectify his error, or to accede to any other reasonable request, the actual or imaginary grievance would in most cases immediately be removed, at least much sooner than by an expensive application to a judge or the Court. But such amicable proceedings would not answer the *object* of that grade of practitioners who seek not either the honour of their profession, or the *true* interests of their clients, or care about the correctness of the practice of the Courts in general; but merely seek the indulgence of some feeling of resentment towards the opponent, or still more commonly to indulge the appetite *for costs*; and they in reality desire *not* to attain the very object they profess to pursue, but hope that the opponent will not discover his irregularity, but will resist the application, so that the costs may thereby be increased. We have, moreover, seen that the Courts some-

(*a*) *Ante*, vol. iii. ch. ii. p. 64 to 89.

(*b*) See also *ante*, vol. iii. p. 76 to 81; 275 to 281.

times have perhaps *carried too far the principle* that it is essential to enforce the rules of practice in order to secure their observance even to a letter; (*c*) as, for instance, by resolving that the mis-spelling the defendant's name Calver instead of Calvert, in the copy of a rule served upon him personally, rendered such rule wholly inoperative and invalid, and even allowing the defendant the costs of his application to set the same aside, assigning as a reason, that not to give costs would be a *bounty on negligence;* and this, although on service of such defective copy of the rule, the defendant promised to call and pay. (*d*)

However, the recent growing spirit of improvement, and the dignified resolution of some of the present judges to discourage such practitioners, as far as statutes and rules permit, are certainly calculated to ameliorate the conduct of the practitioners to whom we have alluded, and have introduced some few alterations imposing restraint on sharp and contemptible practice, especially by refusing costs. But still so many advantages may be taken of trifling errors, that it is essential to give them consideration in this chapter.

With deference it is submitted, that no summons or motion, in respect of a mere irregularity, should be given effect to, (except in cases of actual illegal imprisonment, or immediate urgent occasion,) unless it appear that there has been a *previous application in writing* for the very same purpose to the opponent, (*e*) or that costs of the application should not otherwise be allowed, nor should there be any *stay of proceedings* unless *by express leave of the Court,* nor then, unless it be sworn that an exact similar application in writing has been rejected, and that in all cases when notice of motion should be required, copies of affidavits intended to be used shall be served on the opponent, so as to enable him to show cause in the *first instance,* or that no costs be allowed; and to encourage the earliest and least expensive mode of disposing of applications of this nature, costs should be allowed in case of an effectual opposition at such earliest stage; though at present in general denied. (*f*)

(*c*) *Ante,* vol. iii. p. 68 to 72.

(*d*) *Smith* v. *Calvert,* 2 Dowl. 276. It is unquestionably essential that practitioners should be compelled to observe due care and accuracy; but as regards the *encouragement to those who would take advantage of an immaterial objection,* it would seem that a different theory has been permitted to prevail in the administration of justice than would be tolerated upon other subjects of ethics, the more especially as the unfortunate client, and not the practitioner, is in general the sufferer.

(*e*) It will be observed that many of the modern rules either *imperatively require a previous application,* or qualify the terms granted by the Court; see Reg. Gen. Hil. T. 2 W. 4, reg. 102.

(*f*) See *Fitch* v. *Green,* 2 Dowl. 439; *Greve* v. *Parker, id.* 628; so that it is unfortunately the pecuniary interest of a practitioner not to show cause in the first instance, even in the clearest case

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Other objections to applications to set aside proceedings for irregularity.

We have in the preceding part stated some other reasons against applications to set aside any proceeding on account of irregularity, unless some positive injury has ensued. (*g*) Another strong reason, especially in cases of the least doubt, is, that there is an express rule of Court in K. B., "that in all "cases where a rule is obtained to show cause why proceedings "should not be set aside *for irregularity with costs*, and such "rule is afterwards discharged generally, without any special "directions upon the matter of costs, it is understood to be "*discharged with costs*, and the latter rule must be drawn up "accordingly." (*h*)

When the taking a technical advantage may be proper.

It is well known that technical objections are taken principally on behalf of *defendants* and in delay of a just action; but not unfrequently they are taken on behalf of a plaintiff, and may be equally unjust: thus, when it is known that there is a bona fide intention to defend an action upon the merits, or on some fairly disputable point of law, the signing judgment as for want of a plea, merely because by accident the plea, although settled by counsel, was not signed by him, is, to say the least, a proceeding unworthy of a liberal profession. And although there may occur instances in which a party and his attorney may justly take advantage of the blunder of his opponent, as where there has been a harsh or vindictive arrest, or where, by taking the objection, the opponent may be compelled to submit to proper terms, which could not otherwise be obtained. Yet even in the few cases of this nature, the practitioner who wishes his character to stand high, should, in general, when the object has been accomplished, refuse to take more than his costs out of pocket, or actual expenditure, thereby evincing that individual profit constituted no part of the motives for adopting the proceeding.

3rd. *Time* of application in respect of irregularity or other relief.

Before Reg. Gen. H.T. 2 W. 4, r. 33, it was the *established practice* of the superior Courts that all applications, especially those to set aside proceedings for *mere irregularity*, should be made as early as possible, or, as it was commonly said, *in the first instance*; (*i*) and if a party *waived* the irregularity, or *omitted* to object to it, *within a reasonable time*, or *took* or *suffered to be taken* (*k*) a subsequent step in the cause, and

(*g*) *Ante*, vol. iii. p. 76 to 81; 275 to 281.

(*h*) Reg. Mich. T. K. B. 37 G. 3.

(*i*) Tidd, 9th ed. 160, 513; Jervis's Rules, 51, (*k*); *Petree* v. *White*, 3 T. R. 7; *D'Argent* v. *Vivant*, 1 East, 334; *Steele* v. *Morgan*, 8 Dowl. & Ryl. 450; —— v. ——, 3 Price, 37; *Warren* v. *Cross*, 9 Price, 637; *Monday* v. *Sear*, 11 Price, 125.

(*k*) *Rutty* v. *Auber*, 3 Tyr. 591; 1 Cromp. & Mee. 531; 2 Dowl. 47, S. C.

thereby *occasioned* or *permitted* increase of expense, he could not, at least in the King's Bench or Exchequer, afterwards revert back and object to the previous *irregularity* in a mere practical proceeding.(*l*) But the application of this rule was not uniformly certain, and there *was* a distinction between the practice of the Court of Common Pleas and that of King's Bench and Exchequer, for in the former a party was not bound to any particular time; and it *was considered* sufficient if he made the application, however late, before the opponent had taken a further step in the cause; (*m*) and when notice of the objection had been candidly given, it was deemed reasonable to assume that the party thus apprised of the defect in his proceedings would not venture to proceed any further, and that if he did, it was reasonable, after such proceeding, to move to set aside that which was irregular. (*n*)

But as respects *mere irregularities*, (now by Reg. Gen. M.T. 3 W. 4, r. 10, including all *omissions* in process or indorsements directed by statute 2 W. 4, c. 39,) the General Rule, H. T. 2 W. 4, r. 33, directs, that "*no application to set aside* "*process or proceedings for irregularity shall be allowed, un-* "*less made within a reasonable time, nor if the party applying* "*has taken a fresh step after knowledge of the irregularity.*" This rule is considered to have assimilated the practice of all the Courts, and to render it as necessary in the Common Pleas as in King's Bench and Exchequer, that the party objecting to any irregularity should observe *two* points, viz. *first*, to apply to set aside the irregular proceeding within a *reasonable time*, whether or not he has given notice of the objection; and *secondly*, at all events to make such application *before he himself has taken any step* in the cause; (*o*) and by the *general* practice of the Court, it seems that a *third* point is to be observed, viz. to make the application on account of the irregularity before the *party guilty of it has taken a fresh step* in the cause, in consequence of concealment of the objection, or obtaining possession of the irregular document. (*p*) And it would

(*l*) Tidd, 161, 513; *Ballentyne* v. *Wilson*, Forest's Rep. 31.

(*m*) Jervis's Rules, 51, n. (*h*).

(*n*) *Ballentyne* v. *Wilson*, Forest's R. 31; *Wickham* v. *Mealing*, 2 Price, 9; *Dand* v. *Barnes*, 6 Taunt. 5; *Fletcher* v. *Wells*, *id.* 191; *Rawes* v. *Knight*, 7 Moore, 461; 1 Bing. 132, S. C.; *Hompay* v. *Kenning*, 2 Chitty's Rep. 236; Tidd, 514.

(*o*) As to the applicant's taking *any step* in the action after knowledge of the irregularity precluding him from objecting, see observations of Parke, B. in *Fynn* v. *Kemp*, 2 Dowl. 620. "You must always come before the next step has been taken, however short the time for doing it may be, and in a reasonable time."

(*p*) *Rutty* v. *Auber*, 3 Tyr. 591; 1 Cromp. & Mee. 531; 2 Dowl. 47.

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now seem, that although a party objecting to an irregularity has given explicit notice thereof, yet he must also take out a summons or move to set aside the proceeding within a reasonable time, unless his opponent give him notice that he abandons the irregular proceeding, or obtains leave to amend.

We have in the preceding part of this volume stated many of the decisions on this rule as to the *time* when an application to set aside *process*(q) or an *affidavit*(r) for a defect or irregularity must be made. It has been decided that this rule extends to *prisoners* continuing in custody, and who are therefore equally bound as persons at large promptly to take out a summons or move the Court to set aside any practical proceeding in respect of an irregularity.(s) It extends also even to proceedings to *outlawry*, which being filed in the sheriff's office, the defendant might search for, and thereby ascertain the objection, and this although he swear that he remained in ignorance of the proceeding for several weeks, and until he did apply.(t)

If the irregularity occur in *vacation* and be known, (or even *capable of being known by due search*,)(u) we have seen that the application must be made *promptly*, i. e. in general *within eight days* after service of serviceable process, or arrest on bailable process, and it would certainly be too late to apply to the Court in the next term.(x) But if the irregularity be unknown, and not capable by search of being readily ascertained, no laches can reasonably be imputed, nor can there in such case be any waiver implied of the right to object;(y) for it will be obvious that "*reasonable time*" in the rule is a relative term, depending on the circumstances of each case; and if without default of the defendant, and still more if attributable to the plaintiff's default, the defendant is delayed in knowledge of the irregularity, then, if he come within a reasonable time after he has intimation of the objection, his application ought (if in any case) to be given effect to.(z)

(q) As to process and indorsements thereon, *ante*, vol. iii. 226 to 233, 244; *objections to writ of summons*, *id.* 275, 276.

(r) As to affidavits, vol. iii. 340.

(s) *Primrose* v. *Baddeley*, 2 Dowl. 350.

(t) *Lewis* v. *Davison*, 3 Dowl. 272, 274; *Anderson* v. *Stirling*, 2 Dowl. 267.

(u) *Lewis* v. *Davison*, 3 Dowl. 272, 274; *Anderson* v. *Alexander*, 2 Dowl. 267.

(x) *Ante*, vol. iii. 227, 237, 238; *Cox* v. *Tullock*, 3 Tyr. 578; 1 Cromp. & Mee. 531; 2 Dowl. 47; *Anderson* v. *Alexander*, 2 Dowl. 267; *Elliston* v. *Robinson*, 2 Cromp. & Mee. 343; 2 Dowl. 241; *Routledge* v. *Giles*, 2 Cromp. & Jer. 163; *Wright* v. *Warren*, 3 Moore & Scott, 163; *Rutty* v. *Auber*, 3 Tyr. 591.

(y) *Cox* v. *Tullock*, 3 Tyr. 578; 2 Dowl. 47.

(z) *Wright* v. *Warren*, 3 Moore & Scott, 163; 2 Dowl. 724; *Anderson* v. *Alexander*, 2 Dowl. 269; Tidd, 71; *ante*, vol. iii. 227.

It is obviously reasonable that all objections contemporaneously existing, and discovered at the time of making any application to the Court on account of supposed irregularity, should then be brought forward, and not kept in reserve, in order afterwards to sustain another application of the same nature; and the practice accords. But an application of a distinct nature may reasonably be delayed until one for irregularity has been disposed of. (*a*). Thus the pendency of a motion to set aside proceedings for irregularity, was deemed a sufficient excuse for delay in an application, even for several terms, to have money paid into Court in lieu of bail restored to the defendant, where the defendant had been arrested whilst privileged from arrest. (*a*)

All objections must be taken at once and not successively; but *aliter* as to applications of a different nature.

The *principle* requiring applications in respect of irregularities to be made within a reasonable time, extend also to other cases, as to applications under the interpleader act. (*b*)

Many of the decisions relating to the *time* within which an application must be made in respect of a *mere* irregularity antecedent to declaration, proceed on the same principle, and have been already noticed in the most authentic works; (*c*) and when we examined *process*, (*d*) *affidavits* to hold to bail, (*e*) and other proceedings in the preceding part of this volume, the more recent decisions were noticed. (*f*) We have shown how early objections to each must be taken, and what acts waive or preclude a party from taking an objection. It may however assist in practice here to give a summary of the times when objections to irregularities in proceedings must in general be taken by summons or motion, and what acts waive the objection.

Summary of the times of objecting, &c.

Attorney.—An irregularity by taking a proceeding in the name of a new attorney, without having obtained a judge's order for the change, may be waived by the opponent's taking any subsequent proceeding, as by taking a plea pleaded by a new attorney out of the office, or by keeping it. (*g*)

Chronological enumeration of the principal irregularities, and times of objecting to same.

Affidavit to hold to Bail.—An affidavit to hold to bail is not

(*a*) *Pitt* v. *Coombs*, 4 Nev. & Man. 535.

(*b*) *Foote* v. *Dick*, 1 Harr. & Wol. 207; *Ridgway* v. *Fisher*, *id.* 191; 3 Dowl. 567.

(*c*) Tidd, 9th ed. 160, 513; 2 Arch. K. B. 4th ed. Arch. C. P. ; Chitty's Summary, 96 to 99; 2 Harrison's Index, 326, 327.

(*d*) *Ante*, vol. iii. part 5, p. 227, 228, 237, 238, 368, 369.

(*e*) *Ante*, vol. iii. part 5, p. 340, 368, 369.

(*f*) *Ante*, vol. iii. part 5, *per tot.*

(*g*) *Margerem* v. *Makilwaine*, 2 New R. 508; *Farley* v. *Hebbs*, 1 Harr. & Wol. 203; 3 Dowl. 538, S. C.

strictly "*process*," nor a "proceeding" within the General Rule Hil. T. 2 W. 4, reg. 33;(*g*) but still according to the general principle and practice of the Courts, objections to its regularity or validity must be taken within a *reasonable time*, or the Courts will not interfere on summary application to set aside the arrest or bail-bond, or imprisonment upon the same; and if the defendant has taken any inconsistent step, admitting that he was bound to submit to its operation, it will be too late to apply. (*h*) Therefore it is too late to object on summons or motion to such affidavit after the defendant has put in bail, (*i*) or has deposited the sum sworn to and 20*l*. in lieu of bail above, (*k*) or has obtained time to put in bail above, (*l*) or after the time for putting in bail above, viz. eight days, inclusive of the day of arrest, has elapsed; (*m*) nor after any other unreasonable delay, (*n*) nor after the defendant has ineffectually attempted to justify bail, though the Court may be induced to give further time, partly in respect of an objection to the affidavit, (*o*) and where the arrest was on the 22d May, it was held too late on 4th June to apply for defendant's discharge on the ground of a defect in the affidavit, the sheriff having in the mean time been ruled to return and marked his return, (*p*) and where a defendant induced the plaintiff's attorney to accept certain persons as bail without opposition, by affecting to submit to a judge's decision respecting the sufficiency of the affidavit to hold to bail, it was held that he could not afterwards sustain a rule nisi for discharging the defendant out of custody, on the ground that the affidavit was defective. (*q*) But the circumstance of the affidavit having been mislaid in the office, so that the defendant was delayed in ascertaining the objection, may excuse delay.(*r*) It has been recently decided, that in an action for false imprisonment for an arrest, upon a writ of capias issued on an informal affidavit, the defendant may justify under the writ, unless it has been set aside, so that it would seem that notwithstanding the 12.Geo. 1, c. 29, requires a sufficient affidavit to be filed before an arrest, it is essential that a de-

(*g*) Per Bayley, B. in *Smith* v. *Stephens*, 3 Tyrw. 220.

(*h*) *Ante*, vol. iii. 340.

(*i*) *Reeves* v. *Hacker*, 2 Tyr. 161; 2 Crom. & J. 44. S. C.; *Morgan* v. *Bayley*, 3 Dowl. 117; *Green* v. *Glasebrook*, 1 Bing. N. C. 516; 1 Hodges, 27, and see the cases before Reg. Gen. Hil. T. 2 W. 4, c. 33, Tidd, 188.

(*k*) *Green* v. *Glasebrook*, 1 Hodges, 27; 1 Bing. N. C. 516, S. C.

(*l*) *Urquhart* v. *Dick*, 9 Legal Obs. 221, 222.

(*m*) *Tucker* v. *Colegate*, 2 Crom. & J. 489, 2 Tyr. 496, *Firley* v. *Rallett*, 2 Dowl. 708.

(*n*) *Firley* v. *Rallett*, 2 Dowl. 708.

(*o*) *Morgan* v. *Davis*, 5 Moore & S. 93, *Downes* v. *Witherington*, 2 Taunt. 213.

(*p*) *Firley* v. *Rallett*, 2 Dowl. 708.

(*q*) *Mammatt* v. *Mathews*, 2 Dowl. 797.

(*r*) *Ladbrook* v. *Phillips*, 1 Harrison R. 109.

fendant, who would take advantage of a defect in the affidavit, should apply to the Court within a reasonable time, or he could not sustain any action for the imprisonment or other proceeding. (s) If the affidavit be so defective as to be void, and the writ and arrest on that account set aside, the defendant would, unless restrained by express rule, be entitled to an action of trespass for the illegal arrest; but it is usual upon motion for discharging the defendant out of custody on that ground, to make the rule absolute with costs, on the terms that the defendant shall not bring an action of trespass, but only case for a malicious arrest, which could only be sustained in case the sum sworn to was not due, and the arrest was without probable cause, or to refuse the costs of the application. (t)

Writ or *Copy, Time or Mode of Service.*—Applications, whether by summons or motion, in respect of any irregularity in a writ, or in the indorsements thereon, or in the copy thereof, or in the time or mode of service, should be made within eight days inclusive, after the service or arrest, whether in vacation or term, being the time allowed for entering the defendant's appearance or putting in bail above. (u)

And if a writ has been improperly *indorsed* with a non-existing place, but was served on 25th October, application to set aside the service of a copy of the writ for irregularity on the 3d November, was holden too late, for the application should have been made *within eight days* inclusive after service, either to a judge in vacation or to the Court in term, and the application should have been on or before the 1st November; (x) and where an arrest was on the 29th January, and on the 10th March following the defendant, continuing in custody, applied to a judge to be discharged on account of irregularity in the capias, it was held he was too late. (y) And where in proceedings to outlawry the first writ had been irregularly indorsed, yet as such writ had, according to the usual practice, been filed at the sheriff's office, and the defendant might by search have ascertained the objection, it was held that after six weeks had elapsed it was too late to object, although he swore that he did not in fact know of the objection till such six weeks had elapsed; (z)

(s) *Riddell* v. *Pakeman*, 1 Gale, 104; 3 Dowl. 714, 721, S. C. But in *Finch* v. *Cocker*, Exchequer, 4th May, 1835, MS.; 3 Dowl. 678, it was held, on motion in arrest of judgment, that an action could not be sustained on a bail bond executed on an affidavit and process against the defendant by a *wrong name*, for the arrest being illegal and *void*, the bail bond therefore was also *void*.

(t) *Gray* v. *Shepherd*, 3 Dowl. 442.

(u) See in general, *ante*, vol. iii. 227, 237, 276, 368, 369; *Rawes* v. *Knight*, 1 Bing. 132.

(x) *Tyler* v. *Green*, 3 Dowl. 439; 9 Legal Obs. 173; *Cox* v. *Tullock*, 3 Tyr. 578; 1 Cr. & M. 531; 2 Dowl. 47, (*a*); and see *Fynn* v. *Kemp*, 2 Dowl. 620; *Rust* v. *Chine*, 3 Dowl. 565.

(y) *Foote* v. *Dick*, 1 Har. & Wol. 207.

(z) *Lewis* v. *Davison*, 3 Dowl. 272.

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and eighteen days delay after the service of a distringas, in applying to set it aside, was holden unreasonable, as the defendant could not show that he was prevented from coming earlier. (*a*) At all events, however, an application *six* days after an arrest is not too late to object to an irregularity in the writ or copy. (*b*)

An irregularity *in service* of process is *waived* by defendant's attorney having written to plaintiff's attorney, after the process was served, undertaking to appear; (*c*) so by admitting the debt after service, and requesting time to pay it. (*d*) And a defendant waives an objection to process on account of *misnomer*, by obtaining a judge's order upon a summons, using the name by which he was arrested; or rather such an act affords evidence that the defendant is known as well by one name as the other, in which case a judge will not interfere. (*e*) And it has been decided, that by executing a bail bond in the full Christian and surnames, waives an irregularity in the writ, describing the party by his initial only. (*f*) And although it might have been supposed that if no process had been served at all, subsequent proceedings might be utterly void; yet if notice of declaration be served before any process, the defendant must take advantage of the objection before judgment by default be signed. (*g*)

Appearance.—An irregularity in an appearance, entered by the plaintiff for the defendant, must be taken advantage of before judgment by default; (*h*) though if there were no appearance at all, then a declaration delivered, or interlocutory judgment signed, would be a nullity that could not be waived. (*i*)

Bail above and Notice of Justification, &c.—An irregularity in a notice of bail is waived by obtaining time to inquire after them; (*k*) and an irregularity in omitting a proper description of bail in a *notice of justification* was held aided by entering an exception; (*l*) and although before the Reg. Gen. Hil. T. 2 W. 4, r. 33, it was held in the King's Bench that the omission to *enter* an exception to bail was not waived by even two notices of justification, (*m*) the contrary has since that rule

(*a*) *Wright* v. *Warren*, 3 M. & Scott, 163; 2 Dowl. 724.

(*b*) *Smith* v. *Pennell*, 2 Dowl. 654.

(*c*) *Anonymous*, 1 Chitty's R. 129; *Hompay* v. *Kenning*, 2 Chitty's R. 236.

(*d*) *Rawes* v. *Knight*, 1 Bing. 132; but see 1 Dowl. 23.

(*e*) *Nathan* v. *Coken*, 1 Harr. & Woll. 107; 3 Dowl. 370.

(*f*) *Kingston* v. *Llewellyn*, 4 Moore, 317; 1 Brod. & Bing. 529, S. C.; *Howell* v. *Coleman*, 2 Bos. & Pul. 466; Tidd, 148; but see *Taylor* v. *Rutherman*, 6 Moore, 264; *Luke* v. *Silk*, 3 Bing, 296.

(*g*) *M'Quoick* v. *Davis*, 2 Chitty's R. 164; and see *Williams* v. *Strahan*, 1 New Rep. 309; Pr. Reg. 32.

(*h*) *Williams* v. *Strahan*, 1 New R. 309; Pr. Reg. 32.

(*i*) *Roberts* v. *Spurr*, 1 Harr. & Woll. 201; 3 Dowl, 551, S. C.

(*k*) *Foster's bail*, 2 Dowl. 586.

(*l*) *Bigg* v. *Dick*, 1 Taunt. 17; Tidd, 266.

(*m*) *Hudson* v. *Garrett*, 1 Chitty's R. 174; *Rex* v. *Middlesex*, 5 Bar. & Cres. 389; Tidd, 301; *ante*, vol. iii.

been determined.(n) But it has been held that, although the parties in an action do not themselves object to the insufficiency of an *affidavit* of justification, in not stating the residences of the bail during the last six months, yet the Court ex mero motu will not allow the justification to stand, though they gave leave to amend. (o)

Declaration, and Delivery or Filing same, and Notice thereof.—If a declaration has been delivered absolutely, although no appearance has been entered by the defendant or the plaintiff for him, the defendant may apply to set aside such declaration, although it amounts to a nullity; (p) and if a notice of declaration, or the declaration itself describe a different form of action to that expressed in the writ, or otherwise materially vary therefrom, the irregularity may be taken advantage of by summons or motion. (q) An irregularity in the *notice of or filing or delivery* of a declaration, must be taken advantage of before appearance, (r) and a fortiori before plea, and before taking out a summons to stay proceedings on bail-bond, (s) and before judgment has been signed for want of a plea, although no process had been served on the defendant. (t) If a declaration be improperly filed, instead of delivered, and notice of inquiry be given on 4th November for the 12th November, a motion to set aside interlocutory judgment on the latter day is too late; (u) and if the irregularity be in the delivery, filing, or notice of declaration, it was held in some older cases that the application should be made if possible two days before the time appointed for executing the inquiry; (x) and if bail have consented to a stay of execution, the Court will not afterwards relieve them on account of a *variance* between the affidavit to hold to bail and the *declaration.* (y) Where a defendant had duly entered his appearance, but the plaintiff's attorney had in searching overlooked the entry, and in consequence irregularly *filed* the declaration, and served the defendant with notice thereof on 26th January, and the latter, instead of informing the plaintiff's attorney of his irregularity in conversation, concealed any intimation of it, but suffered him to proceed, and judgment for want of a plea was signed on 4th February, the Court re-

(n) *Hanwell's bail*, 3 Dowl. 425.
(o) *Sywood and Dogherty's bail*, 3 Dowl. 116; 1 Bing. N. C. 258, but differently reported.
(p) *Roberts* v. *Spurr*, 1 Harr. & Woll. 201.
(q) *Edwards* v. *Dignam*, 4 Tyr. 213; ante, vol. iii. 197, 228, note (p).
(r) *Fynn* v. *Kemp*, 2 Dowl. 620.
(s) *Davis* v. *Owen*, 1 Bos. & Pul. 342.
(t) *Smith* v. *Clarke*, 2 Dowl. 218; *M'Quoick* v. *Davis*, 2 Chitty's R. 164.
(u) *Scott* v. *Cogger*, 3 Dowl. 212.
(x) *Gaire* v. *Goodman*, 2 Smith, 391; *Minster* v. *Coles*, 2 Chitty's R. 237; *Moffat* v. *Carter*, 2 New R. 75; *Cole* v. *Bennett*, 6 Price, 15.
(y) *Coppin* v. *Potter*, 1 Bing. N. C. 443.

fused to set aside the proceedings for irregularity. (z) But where upon serviceable process the plaintiff had irregularly declared too soon de bene esse on 7th November, it was holden not too late to apply to set aside such declaration and notice thereof on the 25th November following; but then the debt and costs indorsed on the writ had been paid on the 7th November, and the question in a great measure turned on the right to the costs of the premature declaration. (a)

Taking Declaration out of Office.—We shall in the next chapter advert to the effect of the defendant's taking a declaration, when filed, out of the office, (b) which waives an irregularity in its having been filed conditionally. (c) That act, however, only waives objections to the process or the service of it, but not to the declaration itself. (d) Where a declaration was delivered at the same time as insufficient particulars, and another order was obtained for better particulars, it was held that the defendant's not returning the declaration was a waiver of the irregularity. (e)

Notice to Plead, Rule to Plead, and Demand of Plea.—Pleading any plea, though a nullity, as a plea in abatement, without an affidavit, waives the omission of a rule to plead and demand of plea. (f) And though it was formerly held otherwise, it has recently been decided that a summons for time to plead does dispense with the necessity for a rule to plead. (g) It was held that an irregularity in the plea roll should be taken advantage of before the defendant has accepted the issue. (h)

Plea.—Taking a plea out of the office (when the practice was to file pleas) and keeping it, was holden a waiver of the objection to the plea, that it had been pleaded by a new attorney, without any order to change the attorney, and the acceptance of or keeping a plea would have the same effect. (i) It was, however, held that a plaintiff's demanding particulars of set-off did not waive his right to sign judgment as for want of a plea, where the plea is a nullity; (k) but that was in Common Pleas before Reg. Gen. Hil. 2 W. 4, r. 33, which, we have seen, directs that a party taking *any step* shall preclude him from taking advantage of an irregularity. (l)

(z) *Rutty* v. *Arbur*, 2 Dowl. 36.
(a) *Fish* v. *Palmer*, 2 Dowl. 460.
(b) *Post.*
(c) *Gilbert* v. *Kirkland*, 1 Dowl. 153.
(d) *Chapman* v. *Eland*, 2 New Rep. 83; *Rex* v. *Horne*, 4 T. R. 349; *Archer* v. *Barnes*, 3 East, 342.
(e) *Aspinal* v. *Smith*, 8 Taunt. 592.
(f) *Perry* v. *Fisher*, 6 East, 549; Tidd, 476.
(g) *Nugee* v. *M'Donell*, 3 Dowl. 579; but see *Decker* v. *Sheddon*, 3 Bos. & P. 180.
(h) *Combe* v. *Pitt*, 1 Bla. R. 525; 3 Burr. 1682, S. C.
(i) *Margerem* v. *Makilwaine*, 2 New R. 508, 509; and *Farley* v. *Hebbs*, 1 Harr. & Wol. 203.
(k) *Ford* v. *Bernard*, 6 Bing. 534; *Garratt* v. *Hooper*, 1 Dowl. 28.
(l) *Ante*, 513.

Affidavits and Rules.—It is no waiver of the right to object to the sufficiency of an affidavit in support of a rule nisi, that the opponent has produced affidavits in opposition, and argued upon the merits, (m) and if the copy of a rule nisi be incorrectly or not duly intituled in the cause, the appearance of counsel in opposition does not waive the defect. (n)

Judgment, signing of.—Defendant's attending the taxation of costs waives an irregularity in signing judgment too soon; (o) and as an irregularity in the interlocutory judgment cannot be shown as cause against a rule nisi to compute, the only course is to obtain a cross-rule to set aside the judgment, and to arrange that both rules shall come on together. (p) And the Court refused to set aside an interlocutory judgment which had been irregularly signed three years previous, without a rule to plead. (q)

Writ of Inquiry and Inquisition thereon.—If eight instead of fourteen days' notice of inquiry be given, when defendant resided more than forty miles from London, he should *return* it, and if not, although the Court will, even on a late application, set aside the inquiry, yet they will not give costs. (r)

Issue and Paper Book.—Accepting and not returning the Issue or Paper Book admits it to have been properly made up; (s) and therefore if there be any variance therein from the pleadings previously delivered, without an order to amend, or other irregularity in making it up, the defendant's attorney should return it forthwith, (usually within twenty-four hours,) and immediately take out a summons for setting it right; as he could not otherwise take advantage of the irregularity. (t)

Notice of Trial or Inquiry.—If a notice of inquiry, or of trial, be insufficient, it should be forthwith returned; and if it be irregular as to the time or place when or where it will be executed, the objection will be aided by the defendant or his attorney attending on the execution of the inquiry, or the trial, and making defence; though his merely attending by counsel, who takes notes, but does not otherwise interfere, would not preclude him from afterwards applying to set aside the proceedings. (u)

(m) *Clothier* v. *Ess*, 3 Moore & S. 216; 2 Dowl. 731; *Barham* v. *Lee*, 4 M. & Scott, 327; 2 Dowl. 779, *post*, 546, note (q).

(n) *Wood* v. *Critchfield*, 3 Tyr. 235.

(o) Tidd, 930; 2 Arch. K. B. 4th ed. 887.

(p) *Branning* v. *Paterson*, 4 Taunt. 487; *Jones* v. *Chune*, 1 Bos & Pul. 363; *Marryatt* v. *Wingfield*, 2 Chit. 119.

(q) *Lewis* v. *Brown*, 3 Dowl. 700.

(r) *Stevens* v. *Pell*, 2 Cr. & M. 421; 2 Dowl. 355.

(s) *Shepley* v. *Marsh*, 2 Stra. 1131; *Thompson* v. *Tiller*, *id.* 1266; *Doe* v. *Cotterill*, 1 Chit. Rep. 277.

(t) *Mather* v. *Brinker*, 2 Wils. 243; *Doe* v. *Cotterell*, 1 Chitty's R. 277; Tidd, 727.

(u) 2 Arch. K. B. 4th edit. 887.

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Scire Facias.—If a defendant plead to a scire facias pending a rule he had obtained to set aside the same for irregularity, it was held that he waived the irregularity by his plea.(*u*)

Execution.—If an execution be issued after a year without a scire facias, or an agreement that it shall not be necessary, it will be a nullity, and a defect, not waived by delay, in the application even of several years.(*x*) But if notice of taxing costs be omitted before judgment, and execution be therefore irregularly levied against defendant's goods, he must apply immediately to set the same aside.(*y*)

Prisoners, though supersedable before judgment, as for want of declaring in due time, may waive the right to be superseded, by afterwards pleading; (*z*) and after the lapse of two terms the Court will not discharge the defendant out of custody, on the ground that his addition and place of abode were not indorsed upon the ca. sa.(*a*)

4. Distinction between such informalities as constitute mere *irregularities*, or are *nullities.* (*b*)

There is a marked, and in many respects important and substantial distinction, between such defects in practical proceedings as constitute *mere irregularities,* and such that render the proceedings a *total nullity, and altogether void;* for although an irregularity may be waived, and must be objected to within a reasonable time, it has been considered to be a general rule, that a *nullity,* or *essential defect,* may be taken advantage of *at any subsequent* stage of the action;(*c*) though that expression must be understood with *some qualifications.*(*d*) The number of NULLITIES before the uniformity of process act, 2 W. 4, c. 39, and when mistakes in the teste and return days of writs were so frequent, was much greater than at present; for we have seen that as regards process and its requisites, the judges have, by the express Reg. Gen. Mich. T. 3

(*u*) *Sloman* v. *Gregory,* 1 Dowl. & Ryl. 181.

(*x*) *Mortimer* v. *Piggott,* 2 Dowl. 615, *sed quære,* 523, 524, note (*l*).

(*y*) *Routledge* v. *Giles,* 2 Crom. & Jer. 163; and see *post,* as to costs.

(*z*) *Primrose* v. *Baddeley,* 2 Dowl. 350; *Robertson* v. *Douglass,* 1 T. R. 191; *Pearson* v. *Rawlings,* 1 East, 77; 6 T. R. 324, S. C.

(*a*) *Constable* v. *Fothergill,* 2 Dowl. 591.

(*b*) See in general, Tidd, 9th edit. 515, 152, n. 160, 161, 218, *b*; 2 Archb. K. B., 4th edit. 888; Bagley's Chamber Pract. 97.

(*c*) *Id. ibid.*; Bagley's Ch. Pract. 97, and cases there cited.

(*d*) Thus a plea in abatement, without a correct affidavit of its truth having been annexed, may be treated as a nullity, and the plaintiff might sign judgment as for want of a plea. So if a special plea, requiring the signature of counsel, be delivered without such signature, it may be treated as a nullity, and plaintiff might sign judgment. But in each of these cases of nullities, if the plaintiff, instead of signing judgment, reply to the plea, he waives the objections, and could not afterwards take advantage of it as before he might have done.

W. 4, r. 10, ordered "that if the plaintiff or his attorney shall "*omit* to insert or indorse on any writ, or copy thereof, any of "the matters *required by the act*, 2 W. 4, c. 39, to be by him "inserted therein, or indorsed thereon, such a writ or copy "thereof *shall not* on that account be *held void;* but may be "set aside *as irregular* upon application to be made to the "Court out of which the same shall issue, or to any judge." It is obvious, from the terms of this rule, that the learned judges intended to *diminish*, rather than create new difficulties or objections; and, at all events, to prevent any deviation from the prescribed *new* forms being treated as *a nullity*, or rendering the same *void*, or subjecting the plaintiff or his attorney to an action on account of any irregularity, many instances of which were previously known in practice.(*e*) So that now there are but few defects that render process a *nullity*. But there are still some few defects which have been considered wholly to *nullify* the proceedings. Thus it would seem, that if a defendant be arrested upon a writ issued against him by a *wrong name*, a bail bond executed thereon would be void, and no action thereon can be supported;(*f*) and the delivery of a declaration before an *appearance* to serviceable process has been entered, has been holden to be such an utter nullity, that it was not waived by the defendant's keeping the declaration a month, and omitting to plead, and permitting, after notice, judgment by default to be signed.(*g*) So is the filing a plea in abatement, without an affidavit of its truth, peremptorily required by the statute 4 Anne, c. 16.(*h*) So if in the title of an affidavit, or an order or a rule, the names of the parties be so transposed as to cause an ambiguity, although the latter might be amended, yet the same would until amended be a nullity.(*i*) And if after a year the defendant be taken in execution upon a judgment, without a scire facias to revive the judgment, it will be a nullity; and although the defendant have continued in execution for twelve years, he is not too late to apply.(*k*) It is necessary, however, to state that that decision was contrary to prior decisions not cited, according to which an execution after a year, without a scire facias, is not absolutely void, but only voidable by writ of error, or application to the Court, or a

(*e*) *Ante*, vol. iii. 75, 76, and Arch. C. P. [49, 50.]

(*f*) *Finch* v. *Cocker*, Exchequer, 4th of May, 1835, *ante*, 517, (*s*). And yet we have seen, that unless a writ has been set aside, on the ground that the affidavit was defective, an arrest under it may be justified. *Reddell* v. *Pakeman*, 1 Gale, 104; 3 Dowl. 714—721, S. C.; *ante*, 516, 7, *sed quære*.

(*g*) *Robarts* v. *Spurr*, 1 Harr. & Woll. 201; 3 Dowl. 551, S. C.

(*h*) *Id.*; *Garratt* v. *Hooper*, 1 Dowl. 28.

(*i*) *Price* v. *James*, 2 Dowl. 435.

(*k*) *Mortimer* v. *Piggott*, 2 Dowl. 615.

judge, within a reasonable time.(*l*) And yet, though notice of declaration be served before process, the defendant must take advantage of the defect before judgment signed;(*m*) though if he had no notice whatever of any proceeding, nor was bound to search, then an application, as soon as the defendant had actual intimation of the irregularity, would suffice, however late.(*n*)

The distinction between an irregularity and a nullity is thus far material, that an irregularity must, as well by general ancient practice as by the express terms of Reg. Gen. Mich. T. 3 W. 4,(*o*) be objected to promptly, or within a reasonable time, and before any step adopting it has been taken, or it will be considered waived, and too late to be objected to. But it has been considered that a proceeding that is a *mere nullity* cannot be waived, and may be taken advantage of notwithstanding an inconsistent step by the party objecting, and neither delay nor the taking such step will prevent the party from applying to the Court;(*p*) as in the instance of delivering a declaration on serviceable process on 6th of April, before any appearance had been entered, and signing judgment for want of a plea on 29th of April, although a rule to set it aside was not obtained until the 5th of May, and which judgment, notwithstanding the intermediate proceedings and delay in the application, was set aside on the above principle;(*p*) and where the affidavit annexed to a plea in abatement was defective, although the plaintiff afterwards took out a summons to amend his declaration, and amended the same, and the defendant ruled the plaintiff to reply, and signed judgment of non-pros, and the plaintiff thereupon paid the costs to avoid execution, yet it was held that the plaintiff might effectually move to set aside such judgment, on the ground that the plea continued a nullity, though, as the plaintiff came so late, the Court did not give him the costs of the application;(*q*) and if the affidavit in support of a rule nisi be defective, as wrongly intituled, the opponent does not waive the objection by appearing to the rule, and producing affidavits in answer, and arguing upon them.(*r*)

If a proceeding be declared *void by statute*, as the service of process on a Sunday, then also it has been considered that the

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(*l*) *Patrick* v. *Johnson*, 3 Lev. 404; *Shirley* v. *Wright*, 1 Salk. 273; 2 Ld. Raym. 775, S. C.; 2 Arch. K. B. 4th edit. 688, 888.

(*m*) *M'Quoick* v. *Davis*, 2 Chitty's Rep. 164.

(*n*) *Semble.*

(*o*) *Ante*, 513.

(*p*) *Robarts* v. *Spurr*, 1 Harr. & Woll. 201; 3 Dowl. 551, S. C.

(*q*) *Garratt* v. *Hooper*, 1 Dowl. 28.

(*r*) *Clothier* v. *Ess*, 3 M. & Scott, 216; 2 Dowl. 731, S. C.; *Barham* v. *Lee*, 4 M. & Scott, 327; 2 Dowl. 779, S. C.

defect could not be aided by delay.(s) And if the direct words of a *statute* require a plaintiff to take a particular proceeding, if it has not been adopted the Courts must consider that the omission renders the plaintiff's proceeding a nullity.(t) And a complete *defect* in the proceedings cannot, like a mere irregularity, be waived.(u) But cases of this nature require much consideration, and it cannot be supposed that the doctrine, that a nullity in an early stage of a cause may not be waived; thus, if a defendant plead in bar, and there has been a regular trial and verdict, it is not to be supposed that the latter, or the judgment and execution thereon, would afterwards be set aside on the ground that there was no writ of summons, or no formal appearance for the defendant entered.

5. Of nullities and sudden advantages taken thereof, and when or not they may be justifiably taken.

The Courts are of late more disposed to treat deviations from prescribed practice as *irregularities* than as *nullities*, and most of the recent rules have been framed with that view, as especially the Reg. Gen. Mich. T. 3 W. 4, r. 10, declaring, that *omissions* in writs and indorsements *shall not be deemed nullities*, but merely as *irregularities*, to be objected to within a reasonable time, and before any step taken by the party objecting. So, Reg. Gen. Hil. T. 4 W. 4, requiring the points of demurrer to be stated in the *margin* of a demurrer, merely declares, that if it be omitted, the demurrer may be set aside as *irregular*, yet it only authorizes the *signing judgment* as for want of a plea, and when *express leave of the Court or a judge* has been *first obtained for that purpose*. But there are still some deviations, defects, or omissions, which may be treated as *a nullity*, so that the party who has discovered the mistake may *immediately* sign judgment as for want of a plea, and, *in an action of debt, immediately issue execution* without any notice or intimation to his opponent of his mistake, or any previous application to a Court or a judge; —so, if a plea in abatement be filed or delivered without an affidavit of its truth annexed when necessary, or a special plea, requiring counsel's signature, delivered without having been signed, or a plea not issuable delivered, when a defendant is under terms of pleading issuably, in either of these cases the plaintiff may, in strictness, after the time for pleading has elapsed, sign judgment, and otherwise proceed as if, in fact, no plea had been delivered.

(s) *Taylor* v. *Phillips*, 3 East, 155; *Roberts* v. *Monkhouse*, 8 East, 547.

(t) Per Lord Denman, C. J., in *Mortimer* v. *Piggott*, 2 Dowl. 616; and per Williams, J. in *Roberts* v. *Spurr*, 3 Dowl. 554.

(u) *Osborne* v. *Taylor*, 1 Chitty's Rep. 400; *Anonymous*, 2 Chitty's Rep. 237; Tidd, 515.

When it is *certain* that there is no colour or pretence of *just defence*, but that on the contrary, the defendant is merely defending for time, and with a view of ultimately favouring other creditors, without reserving any funds towards the satisfaction of the plaintiff's debt or costs, then the attorney of the latter may justly take advantage of the blunder and sign and endeavour to retain his judgment and the advantage arising from such unexpected priority. But when, from previous affidavit in the cause, or the nature of the action, or otherwise, the plaintiff's attorney knows that the defendant can and will swear to a defence on the merits, or that the action is fairly disputable, then it is as unfair and unhandsome in practice as it is unjust to snap a judgment on such a ground; indeed, the so doing will most frequently be very injurious to the plaintiff, because the defendant will almost, as of course, be let in to plead more formally, and try the cause, and the time consumed in and relating to the motion for that purpose will probably occasion very considerable delay on the trial, and although the plaintiff's attorney may, in general, (though not always so,) obtain some costs, yet it will be at the expense of his character for liberality, and dispose his opponent, in his turn, to take some other petty advantage; (x) and instead of the cause proceeding and being tried fairly, each practitioner will afterwards meet each other with hostility, and the respective clients suffer.

On this account it will be found that the judges, in general, censure the taking advantages of this nature, without previous notice or leave of a judge, unless the defence is wholly without pretence, when only a practitioner may and, perhaps, ought to avail himself of every opportunity of obtaining priority over other creditors, according to the maxim vigilantibus non dormientibus leges subservient. When a party is under terms of pleading issuably, and a plea be pleaded which it is doubtful whether it is within the meaning of that term, it has always been recommended as a measure of prudence to apply to the Court or a judge *for leave* to sign judgment, especially as a defendant cannot now without leave waive his plea and plead another. (y) Perhaps it would be well, if in all cases, at least before issuing execution, on account of any defective plea or proceeding, it were requisite first to obtain leave to treat the proceeding as a nullity, as in the terms of the before mentioned rule relative to the points of demurrer.

(x) See *ante*, vol. iii.

(y) Tidd, 473, 564, 565, 673, 674; *Hill v. Alexander*, in note, 1 Chitty's R. 525, 526.

6. When the Court will ex mero motu object to an irregularity.

There are some instances in which, although neither of the litigating parties have objected to an irregularity or informality, the Court itself will not suffer the defective proceeding to be allowed to stand as of any validity, as where some useful object might be defeated, or the records and proceedings of the Court might continue slovenly. Thus, although bail be unopposed, the Court will not allow them to justify, if it have been established in a previous case that they are unfit.(z) And where the affidavit of justification of bail had not, pursuant to the express rule, stated the residences of the bail during the last six months, although it was suggested that the plaintiff had waived the objection, by not taking it at the time of the bail justifying, yet the Court considered that *they* were bound not to let the bail stand, though they gave time to amend the affidavit.(a) So, where the commencement of the declaration varied from the usual form, although the Court held the deviation not a ground of demurrer, yet they directed the plaintiff to amend on account of the untechnical deviation.(b)

Of violations of rules merely directory.(c)

Some practical proceedings, whether enjoined only by *rule of Court*, or even by *statute*, have been treated as merely *directory*, in which cases, although the non-observance would probably be censured, yet the error would not be *deemed an irregularity* affecting the *validity* of the proceedings. Thus, the rule of Mich. T. 1 W. 4, requiring the day of the month and year to be indorsed on process, was holden to be *merely directory*, and, therefore, a motion to set aside the service of a writ, not conforming to the rule, *as irregular*, was discharged.(d) But we have seen that of late more judiciously the Courts are inclined to enforce every rule, by treating the non-observance of every useful rule as an irregularity.(e)

8. Notices of irregularity and application to opponent to

In *some* cases it is necessary,(*f*) and it would be well if it were *indispensable in all*, that full notice of the particular irregularity were required to be given a *reasonable* time before

(z) *Laporte's Bail*, 3 Dowl. 110.
(a) *Welsh* v. *Lywood*, 1 Bing. N. C. 258; 3 Dowl. 116, S. C., but stating the defect to have been in the *notice*.
(b) *Dobson* v. *Herne*, 1 Bos. & Pul. 366.
(c) *Ante*, vol. iii. 72 to 76.
(d) *Millar* v. *Bowden*, 1 Crom. & Jer. 563; and see *Whiskard* v. *Wilder*, 1 Burr. 330; *Grice* v. *Allen*, Barnes, 414; *Laing* v. *Cundale*, 1 Hen. Bla. 76; *Evans* v. *Bidgood*, 4 Bing. 63; *Coleby* v. *Norris*, 1 Wils. 91; *Windle* v. *Ricardo*, 3 Moore, 249; *Sheppart* v. *Shum*, 2 Tyrw. 742.
(e) See cases, *ante*, vol. iii. 72 to 74.
(*f*) As where too short notice of trial or inquiry has been given, *Stevens* v. *Pell*, 2 Cr. & M. 421; 4 Tyr. 267; 2 Dowl. 355, S. C. i. e. it is so far *necessary* that *costs will not be given*, unless notice were given, but still in that case the principal prayer of the application will succeed.

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have the same corrected before any summons or motion.

any application to the Court or a judge. If such notice has not been given, the Court will sometimes refuse any rule until an application to the party requiring him to amend has been ineffectual, (e) or will not allow a stay of proceedings pending the rule, or will either refuse costs, (f) or give only the costs that would have been payable upon a judge's order, or direct that instead of the applicant immediately receiving costs, they shall only be costs in the cause. It is obvious that whether a party object to the regularity of a proceeding, or whether he have any other object to attain, good sense and reasonable candour require that he should, before he troubles a judge or the Court, or puts his opponent to any expense, endeavour to attain his object by *civil* application, and nothing but existing imprisonment and the anxiety to obtain an immediate discharge can justify a precipitate application to the Court or even a judge, without first trying the result of an application to the opponent or his attorney; and even in case of illegal imprisonment, an intimation of the irregularity and request for an order on the officer to discharge the party would be in general advisable; for then, if not acceded to, the Court or judge would be the more disposed to award *costs*, and as the *continuance* of the imprisonment would be wilful, a jury would probably award *larger damages* in case an action for the illegal imprisonment should afterwards be tried, and in general the application could not occasion more than a very short delay, probably not an hour. We have seen that this is a general acknowledged principle in equity, and how it may there affect the costs as respects the filing a bill of discovery. (g) Unfortunately, however, according to the existing practice *at law*, a previous application or notice is not *in general* required; and hence the infinity of contemptible applications to the Court or a judge, *professedly* to have mistakes corrected, but which in most cases the opponent would on the least intimation instantly amend; and although costs may not be allowed, yet time is gained, and the defendant is content to bear his own costs as the price of the time he gains, and the temporary victory over his opponent. The form in the note was adopted in a modern

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(e) *Hart* v. *Dally*, 2 Dowl. 257.

(f) *Stephens* v. *Pell*, 4 Tyr. 267; 2 Cr. & M. 421; 2 Dowl. 355.

(g) *Ante*, vol. i. 439; *Weymouth* v. *Boyer*, 1 Ves. jun. 416; 1 Mad. Ch. Prac. 216; *Collyer* v. *Dudley*, 1 Turner & Russ. 421. "*Men should try to obtain their object in the way in which men acting with each other ought first to ask their rights.*" The same principle prevails in the ecclesiastical Courts, *Constable* v. *Tufnell*, 4 Hagg. 508; *Coppin* v. *Dillon*, id. 375.

case, and the Court spoke highly of the candour of the writer. (*h*)

Where a party made an application to the Court and failed, and it appeared that he had not *previously applied* to the opponent or third party, as for the production of a document, and the latter swore that he had always been ready to produce the same if he had been applied to, the Court on that very account discharged the rule *with costs*; (*i*) and there have recently been some excellent and salutary instances of the just exercise of the discretionary jurisdiction of the superior Courts as regards *costs* in cases of this nature, where a party relying on an irregularity had evinced a want of *due professional candour* and an *unworthy eagerness to increase costs*. In one instance in the King's Bench, a defendant's attorney obtained a rule nisi to set aside a declaration for irregularity, because it had been delivered when common bail for one of nineteen defendants had inadvertently not been filed, and immediately after service of the rule the plaintiff's attorney wrote to the defendant's attorney to know the amount of costs, and offered to pay them, but received no answer, and the plaintiff's attorney afterwards offered 5*l.* and requested the defendant's attorney to take the amount, but he refused, "saying the matter must take its *re-*

Form of letter from a defendant's attorney, intimating an irregularity in the plaintiff's proceeding.

(*h*) In the K. B.

Between { A. B. Plaintiff, and C. D. Defendant. }

Sir,

As perhaps my professional duty would not otherwise have authorized my waiving a technical objection to your proceedings, I have stated to my client that the proceedings on the part of the plaintiff have been irregular in the subscribed particulars; and with his sanction I beg thus to communicate the points to you, that you may have an opportunity of correcting the errors, without incurring expense. Be pleased to inform me before —— o'clock to day whether you will amend, for otherwise it will be my professional duty immediately afterwards to obtain a summons or move the Court, as I may be advised. I am, sir, yours, &c.

To. Mr. E. F. Plaintiff's Attorney. G. H.

The irregularities above referred to are as follows [*stating all explicitly*].

The like, accompanying a copy of summons or rule nisi, and of affidavit in a case where an *immediate* application to the Court or a judge was necessary, defendant being in custody.

In K. B. Between, &c.

Sir,

I think it due, in professional candour, to inform you, that your proceedings in this action are irregular in the subscribed particulars. To prevent loss of time and *as the defendant is in custody*, I have been advised that it was essential on the behalf of the defendant [*or* "plaintiff"] immediately to commence proceedings on account of such irregularity, and I therefore send herewith a copy of a summons [*or* rule nisi] and of the affidavit in support thereof, and to prevent any increase of expense, I will delay any further proceedings until the hour of ——, on, &c. before which time I hope to hear from you. But I request you immediately to cause the defendant to be discharged out of custody in this action. Dated, &c.

[The irregularities, &c. *same as before.*]

(*i*) *Ex parte Crisp*, 2 Dowl. 455, 456.

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gular course," whereupon the Court made the rule absolute on payment by the *defendant* of all the costs incurred subsequent to the offer made by the plaintiff's attorney; (*k*) and there is a similar decision in the Court of Exchequer, where the Court ordered *the plaintiff's attorney* to pay the costs incurred subsequent to the offer to pay costs. (*l*) In another recent case, though the plaintiff's attorney had once returned a plea because it was insufficient; but on a second occasion a special plea having been delivered without counsel's signature, the plaintiff's attorney signed judgment as for want of a plea, a learned baron expressed his regret that the plaintiff's attorney had not on the *second* occasion followed his first good example by *returning the special pleas for the purpose of having them signed*; (*m*) and although Reg. Gen. Mich. T. 1 W. 4, reg. 9, requires all proceedings to be served before nine o'clock at night, and a defendant irregularly delivered his plea after that hour, and the plaintiff on a subsequent day signed judgment as for want of a plea, the Court held that the plaintiff's attorney should have returned the plea or given notice of the irregularity, and that therefore the judgment was irregular; (*n*) and if eight days' notice of inquiry instead of fourteen be given, the defendant must return it, or will not recover the costs of setting aside the inquisition, &c.; (*o*) and although it is clearly irregular to file a declaration and give notice thereof, after knowledge that the defendant has entered his appearance, yet if the defendant's attorney neglect to inform the plaintiff's attorney of his irregularity, and take no steps to apprize him thereof by taking out a summons or moving to set aside the notice of declaration, and in consequence the plaintiff's attorney signs judgment for want of a plea, it is afterwards too late to object; (*p*) and although a defendant, under terms to take short notice of *trial*, is not bound to take short notice of executing a writ of *inquiry*, and therefore an eight days' notice served upon him was irregular, and the Court set the inquisition aside; *yet as he had neglected to return the notice immediately, as he ought, according to the established practice, to have done*, in order to prevent expense, but he let six days out of the eight elapse before he gave notice of motion to set aside

(*k*) *Beeston* v. *Beckett*, 4 Man. & Ryl. 100; and see *Rutty* v. *Arbur*, 2 Dowl. 36.

(*l*) *Halton* v. *Stocking*, 2 Cromp. & J. 60; 1 Dowl. 296; 2 Tyr. 165.

(*m*) *Hearne* v. *Battersby*, 3 Dowl. 213.

(*n*) *Horsley* v. *Purdon*, 2 Dowl. 228; but see *ante*, vol. iii. 110, *semble contra*.

(*o*) *Stevens* v. *Pell*, 2 Dowl. 355; 2 Cr. & M. 421, S. C.

(*p*) *Rutty* v. *Arbur*, 3 Tyr. 591; 2 Dowl. 36.

the proceedings for irregularity, and then gave only a general notice, not pointing out what it was, the Court refused costs. (q) It would be very desirable and greatly ameliorate the conduct of *some practitioners*, (r) and relieve the administration of justice from much obloquy, if the principle of these decisions were embodied in a *general rule*, requiring in all cases, excepting those of prisoners in actual custody, and executions requiring *immediate* application to the Court or a judge, a *notice* of summons or motion to precede every application in respect of irregularity, or before any costs can be prayed for on any summons or rule. (r)

9. Notice of motion and consequence of omission, and of obtaining a *stay of proceedings*.

There was always an excellent practice in the Court of Exchequer, that no rule nisi shall be drawn up with *a stay of proceedings* in any case, unless a *notice of motion* has been served two days before the day of moving; (s) and which has recently been confirmed even in cases under the interpleader act; (t) and the same practice prevails in C. P., especially in motions for setting aside proceedings for irregularity. (u) And in all the Courts we have seen, that before a motion for a stay of proceedings until security for costs has been given on behalf of a plaintiff residing abroad, there must be a notice of

(q) *Stephens* v. *Pell*, 4 Tyr. 267.

(r) It is due to the profession to state that certainly the instances of what is termed "*Sharp Practice*" are now comparatively rare. But the instances of *trifling* and *degrading* summonses and motions in respect of alleged *irregularities*, *are much too frequent*, and every member of the profession, anxious to maintain its character, should strongly advocate the annihilation of all such objections, the habit of taking which not only prejudices the character of individuals for fairness and liberality, but ultimately destroys even their *moral probity*, since an individual, who has degraded himself, even in his own estimation as well as in the consideration of his brother practitioners, will gradually be prone to the commission of even more dishonourable practices. A few years since it occurred that an action by a member of parliament upon a money bond, against certain eminent country bankers, was commenced in pique, because one of the partners had voted against the plaintiff on a recent election. The defendants pleaded payment of part and a set-off on the plaintiff's banking account with the defendants, and paid 1500*l.* into Court. By inadvertence, although the draft of pleas was signed by a serjeant, the fair engrossment filed was not, which irregularity having been discovered by the plaintiff's attornies, (a London firm of great business and eminence,) they wilfully signed judgment as for want of a plea, and took all the active partners in execution in their banking house on a market day for 3000*l.* although it was well known to them to be a justly disputed claim. The consequence was a run upon the bank, which, with the greatest difficulty, although the bank had a surplus of 120,000*l.* was fortunately met, and the execution was afterwards set aside. Ought any practitioner to have it in his power, under colour of law, to inflict so serious an injury with impunity, still less benefit by the costs he has occasioned?* It is due to the rest of the profession to state that the firm of the plaintiff's attornies no longer exists. But it is desirable, by rule of Court, to require some notice of so small an irregularity to be given, at least before execution, and thereby prevent a repetition of such contemptible sharp practice.

(s) 9 Price, 14; Dax's Pr. 137; Price's Pr. 288; Jervis's Rules, 55, note (a.)

(t) *Smith* v. *Wheeler*, 3 Dowl. 431; 1 Gale, 15, S. C.

(u) *Rolfe* v. *Brown*, 1 Hodges, 27.

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the motion, and an affidavit of the previous application. (x) But in the King's Bench it has in general been the practice to draw up rules nisi, with a stay of proceedings as of course, without any previous notice of motion, (y) or even counsel naming the point to *the Court*, still less without expressly requesting the Court to direct a stay of proceedings; so that in a mere ex parte application a defendant might for a time stay the plaintiff's proceedings, although it turned out that there was no pretence for so doing. It is true that in such a case the plaintiff may, if he be confident that the objection is not tenable, notwithstanding the express terms of the rule, proceed in his action, at the risk of the motion being decided against him; but that is a hazard which few plaintiffs will venture to incur. In general a rule nisi, " expressly in the meantime staying all proceedings," precludes a plaintiff from regularly taking any proceedings before the rule has been disposed of, (z) and the time for putting in bail and for pleading remains the same after the rule has been discharged as it was at the time it was obtained; and though the taking an assignment of a bail bond is not strictly a proceeding in the action, yet it cannot regularly be taken pending such a rule. (z)

There is however a distinction between rules obtained by a *plaintiff* and by a *defendant*; for if obtained by a *plaintiff*, the defendant is allowed the same time after the rule is disposed of, to take the next step, that he had when the rule nisi was served upon him; but if the rule were obtained by the *defendant*, then he must take the next step on the same day the rule is disposed of, at his peril, but he is allowed the whole of that day so to do. (a) He will not, however, be bound to do so if the rule nisi expressly provide (as it sometimes properly does) that the defendant shall have the same time to take the next step after the rule is disposed of as he had at the time he obtained it. (a) The defendant ought therefore (if the rule do not contain this express provision) pending the rule, take all proceedings essential to be completed by the time the rule will be disposed of, such as justifying bail, expressly declaring that he does so without prejudice, &c. (b)

(x) *Jones* v. *Jones*, 2 Crom. & J. 207. See form of notice and affidavit, Tidd's Forms, 180.

(y) *Stratton* v. *Regan*, 2 Dowl. 585, where the clerk of the rules of K. B. so certified; *semble*, overruling the previous decision in K. B., of Parke, J. in *Fortescue* v. *Regan*, 1 Dowl. 524.

(z) *Swain* v. *Cramond*, 4 Term R. 176.

(a) *Hughes* v. *Walden*, 5 Bar. & Cres. 771; *St. Hanlaire* v. *Byam*, 4 *id.* 970; 7 D. & R. 458, S. C.; Tidd, 301.

(b) *St. Hanlaire* v. *Byam*, 4 Bar. & Cres. 970; 7 Dow. & Ry. 458, S. C.

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Utility of notice of application in other cases.

Besides applications on the ground of irregularity, there are *instances* in other cases where the neglect to make previous application, (*c*) or to give notice of motion, will materially affect the result. Thus on an application under the interpleader act, it was held that if a party applies to the Court by motion, without having made application to the opposite party to do what the rule calls on him to do, he is not entitled to the costs of the rule if the opposite party, on showing cause, confine himself to the question of costs, i. e. do not contest and argue upon the merits of the application. (*d*) And if a prisoner do not give notice of his intended motion to be discharged out of custody, on the ground that he has been a prisoner for twelve months for a debt under 20*l*., the Court will only grant a rule nisi in the first instance; though if such notice had been given, the rule might at once have been absolute. (*e*) And if a defendant move to put off a trial on account of the absence of a witness, if he neglect to give notice to the other side, he will have to pay all intervening expenses incurred by want of notice. (*f*) And if a motion for security for costs be made without previous application and notice, no stay of proceedings will be granted. (*g*)

10. Proceedings on receiving notice, &c., and of the party guilty of an irregularity immediately after notice thereof amending or countermanding defendant's appearance to the writ, or otherwise.

The before-mentioned observations suggest the expediency of the plaintiff or the party, the regularity of whose proceedings has been objected to, immediately to give notice that he waives so much of his proceeding as is irregular; and if before the defendant has entered his appearance, we have seen that it might be advisable to serve a written notice not to appear; (*h*) and it has been stated that the plaintiff, immediately after such notice, may issue and serve regular fresh process; (*i*) but if the defendant has previously appeared or incurred any expense, it may be necessary, before the commencement of any fresh action, to discontinue, and tax and pay or tender the costs; for otherwise the defendant might plead in abatement the pendency of the first action, however irregular the proceedings therein may have been. We have seen the advantage that will in general arise from a party, immediately after he has any intimation of an irregularity in his proceeding, serving

(*c*) See *Bowen* v. *Bramridge*, 2 Dowl. 213.

(*d*) *Id.*

(*e*) *Jones* v. *Fitzaddams*, 2 Dowl. 111; 1 Crom. & M. 85, S. C.

(*f*) *Attorney General* v. *Hall*, 2 Dowl. 111.

(*g*) *Bohrs* v. *Session*, 2 Dowl. 710.

(*h*) *Ante*, vol. iii. 234, note (*b*), where see a form of notice; Bagley's Chamber Pr. 132.

(*i*) *Ante*, vol. iii. 254, (*e*); Bagley's Chamber Pr. 132, cites Tidd, Supp. 65; Chitty's Sum. Prac. 30.

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a notice on the opponent, that he is ready to amend his proceeding, and to pay the costs if any incurred by the party complaining of the alleged irregularity, and actually to tender the amount.(k) But if the party guilty of the irregularity merely offer that the expenses shall be *costs in the cause* instead of being paid *immediately*, that proposition being unreasonable, the opponent may proceed to make his rule absolute, with costs.(l) The form of the notice must of course vary according to circumstances; that in the note may assist.(m).

11. Notice of motion for criminal information against a justice, or for a certiorari.

In some *criminal cases*, and others of a *public nature*, as before any motion for a writ of certiorari to remove a conviction, or for a criminal information against a magistrate, there must be a *notice of motion*, so as to enable the party to show cause in the first instance, and prevent the rule nisi being obtained; and at the time of moving, there must be an *affidavit* in Court of the due service of such notice. The 13 G. 2, c. 18, s. 5, extending in terms to all *convictions*, judgments, orders, and other proceedings *before justices*, requires *six days* previous written notice of the intended motion, to be signed and delivered, with certain prescribed requisites.(n) The practice as to notices of the intention to move for *Criminal Information* has already been fully stated.(o)

(k) *Ante*, 529, 530.

(l) *Clarke* v. *Crockford*, 3 Dowl. 693.

Form of written offer to amend the alleged irregularity, and to pay all reasonable costs, if any, that the party objecting may have incurred.

(m) In the ——.

Between, &c.

You having intimated that there is some technical objection to the proceedings in this action on the part of the plaintiff, [*or* "defendant,"] I beg you to state the particulars thereof immediately, and, if well founded, such objections shall be rectified, or the proceedings will be abandoned; and I hereby give you notice that I am ready to pay all reasonable costs incurred by you or your client by any such objectionable proceedings, upon your informing me of the items and amount; and I have instructed the bearer to tender you a sufficient sum to cover the amount; and I request you not to increase the costs by any proceeding, as I am ready immediately to comply with any reasonable terms you may require, and to consent to a judge's order to the same effect. Dated this —— day of ——, A. D.

Yours, &c.
E. F.,
Attorney for the Plaintiff.

To Mr. G. H.,
Attorney, [*or* "Agent,"]
for the Defendant.

(n) *Ante*, vol. ii. 377, 378.
(o) 1 Chitty's Crim. Law, 873 to 877; Tidd, 498; *ante*, vol. ii. 363 to 365.

SECTION II.—OF AFFIDAVITS IN SUPPORT OF OR AGAINST APPLICATIONS TO A JUDGE OR COURT BY SUMMONS OR MOTION.

The subject of affidavits has been so fully and ably considered in other works, (*o*) that it is here only intended to add a few points, and notice the most recent decisions. When considering affidavits to hold to bail, we also stated many requisites, some of which equally apply to affidavits in general. (*p*)

1. When or not an affidavit is necessary

When any application to the Court or a judge is founded on the *notes* of one of the *judges of the superior Courts*, taken on a trial before him, unqualified credit is given to his accuracy, and no affidavit in support of them can be required; and in case of supposed mistake or discrepancy between such notes and those of counsel, the notes of the judge are *conclusive*, unless he think fit to correct them. With respect also to arrangements or agreements made between the respective *counsel* on each side as to matters in a cause, more peculiarly within their knowledge, so much credit is given to their integrity and accuracy, that no affidavit to establish the fact is required, and their statement is received without corroboration on oath; (*q*) a high privilege, obviously calculated to induce the utmost honour, care and accuracy on the part of counsel, when stating their recollection of what has occurred, and a privilege in no case to be surrendered or waived; (*q*) so if counsel has attended a trial before a sheriff his statement is received in lieu of an affidavit, (*r*) though otherwise such affidavit is indispensable. (*s*) Indorsements by counsel upon their briefs of agreed terms of reference, or upon any other subject in a cause, are also

(*o*) Tidd, 9 ed. 491 to 497, 501; *id.* Supplement, A. D. 1833, Index, tit. Affidavit; 2 Arch. K. B. 4 ed. 1014 to 1022; 2 Arch. C. P. 319 to 322; Bagley's Chamb. Prac. Index, tit. Affidavit.

(*p*) *Ante*, vol. iii. 330 to 341.

(*q*) *Iggulden* v. *Terson*, 2 Dowl. 277; 4 Tyr. 309.

(*r*) *Barnett* v. *Glossop*, 3 Dowl. 625.

(*s*) *Johnson* v. *Wells*, 2 Dowl. 552; 2 Crom. & M. 428, S. C.

evidence. (*r*) But in most other cases, excepting in matters quite of course, whether of summons or motion, it is either indispensable or advisable to support or answer the proceeding by affidavits, containing a faithful, concise, but explicit statement of the fact. (*s*) But each Court takes judicial notice of *its own officers*, and therefore no affidavit that a party moved against is an attorney of the Court is required. (*t*) And the Court in banc, or a judge at chambers, *may* act without affidavit, as in ordering a special jury to be struck the next day, upon the mere statement of the plaintiff's attorney that the rule for a special jury had been obtained for delay. (*u*)

In general, whenever any part of the ground of an application is an *extrinsic fact* not apparent on the face of the proceedings, there must be an *affidavit* of its existence; and even when something apparent on the face of proceedings in a cause not yet upon record, is the subject of application, such proceeding, or a copy, must in general be annexed to an affidavit and verified. Thus a defendant cannot move to set aside process on the ground that the amount of the plaintiff's claim for debt and costs has not been indorsed thereon, without producing an affidavit that the action is for a *debt* within the terms of the rules Hil. T. 2 W. 4, reg. 2, and Mich. T. 3 W. 4, s. 5; (*x*) and upon a motion after verdict, on behalf of a plaintiff, to have out of Court money deposited in lieu of bail, although a judge's order had been obtained by consent for having such money paid out to the plaintiff, the Court said, "*it was necessary that* "*there should be an affidavit to put them in possession of the* "*circumstances, or else that the judge's order should be made a* "*rule of Court.*" (*y*) And in support of an application for a motion for a new trial of an issue tried before the undersheriff, under 3 & 4 W. 4, c. 42, the accuracy of his notes must be verified by affidavit, or the Court will discharge a rule nisi previously obtained. (*z*) And an affidavit must be produced before the master on any reference to him, and without special direction he cannot receive parol evidence. (*a*) If, however, the proceedings in a cause *be expressly referred to in the rule nisi*, (but not otherwise,) they may sometimes be read or referred to by the Court; and if they supply sufficient materials to support the application, a defective affidavit may be dispensed with. (*b*) By the express Reg. Gen. Hil. T. 4 W. 4, reg. 2, an

(*r*) *Porter* v. *Cooper*, 6 Car. & P. 354.
(*s*) *Johnson* v. *Wells*, 2 Crom. & M. 429.
(*t*) *Ex parte King*, 3 Dowl. 41; *Ex parte Hore*, *id.* 600; 1 Harr. & Wol. 211, S. C.
(*u*) *Joseph* v. *Perry*, 3 Dowl. 699.
(*x*) *Curwin* v. *Moseley*, 1 Dowl. 432.
(*y*) *Haines* v. *Nairn*, 2 Dowl. 43.
(*z*) *Johnson* v. *Wells*, 2 Crom. & M. 428, 429, or counsel's statement, *Barnett* v. *Glossop*, 3 Dowl. 625.
(*a*) *Noy* v. *Reynolds*, 1 Harr. & Wol. 14; *ante*, vol. iii. 36, 37.
(*b*) *Howorth* v. *Hubbersty*, 3 Dowl. 456; 1 Gale, 47.

affidavit of its truth must accompany every plea puis darrien continuance. (a) But express rules sometimes dispense with the necessity for any affidavit, as Reg. Gen. Hil. T. 2 W. 4, r. 47, which entitles a defendant to an order for particulars of the plaintiff's demand "without the production of any affidavit." (b) And by reg. 63, the rule for a view may in all cases be drawn up by the officer of the Court, on the application of the party, "without affidavit or motion for that purpose." (c)

2. By whom to be made.

In most cases an affidavit made by a *third person*, not a party to the cause either as a plaintiff or a defendant, may be received, as in the case of affidavits to hold to bail; (d) and a motion to change the venue may be by the defendant's attorney, though if the defendant be in the country, it has been considered that the defendant himself should make it. (e) An affidavit of a convicted felon may be taken off the file, if it be shown by affidavit affirmatively that his competency has not been restored. (f) We have seen that it is the duty of every attorney to take care that no affidavit be sworn by a party who from youth or mental imbecility does not thoroughly understand to what he is deposing; and the practice of permitting a young or inexperienced articled clerk to swear to affidavits has been censured by high authority. It will always be advisable to ascertain and communicate to counsel the age of each deponent who has sworn to affidavits used by the opponent, and if they be very young or of bad character, it would be advisable to deliver to the counsel an affidavit cautiously and not libellously stating the fact, leaving it to his discretion to mention the facts to the Court, who might under circumstances, notwithstanding the positive statement in the affidavit of the individual, refer the matter to the master, or direct other further inquiry. (g)

3. Title of the Court. (h)

Every affidavit made *after* a writ has been issued, and in a cause, must be properly intituled in the *Court*, as, "In the King's Bench," "In the Common Pleas," "In the Exchequer of Pleas." As regards the title of the Court, it is always advisable to state it correctly of that Court in which the cause is depending, or in which it is to be used, and then it will so far always be received, if sworn before an authorized judge or

(a) Jervis's Rules, 98.

(b) Jervis's Rules, 54, n. (w), an affidavit was previously required in Exchequer.

(c) Jervis's Rules, 59, note (m), an affidavit was previously required in C. P.

(d) *Short* v. *Campbell*, 3 Dowl. 487; 1 Gale, 60; 2 Dowl. 785.

(e) *Biddell* v. *Smith*, 2 Dowl. 219.

(f) *Holmes* v. *Grant*, 1 Gale, 59.

(g) Perhaps it might be desirable, if there were a rule that every affidavit shall state the *age* of the deponent, as in some parts of the continent.

(h) *Ante*, vol. iii. 332, 333.

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officer; for the Reg. Gen. Hil. T. 2 W. 4, r. 4, directs, that an affidavit sworn before a judge of any of the Courts of King's Bench, Common Pleas, or Exchequer, shall be received in the Court to which such judge belongs, though not entitled of that Court, but not in any other Court, unless entitled of the Court in which it is to be used. But where an affidavit is sworn before a commissioner of the proper Court in which it is to be used, it need not be intituled in any Court.(*i*)

4. Title of the cause. (*k*)

In stating the *requisites* of an affidavit to hold to bail, we have seen that any affidavit sworn *before* an action or criminal prosecution has been *commenced* ought not to be intituled as in a cause, and the same rule extends to an affidavit on which to found a motion to enter up judgment on a warrant of attorney given when no suit is pending;(*l*) but after a writ has been issued, then an affidavit, relating to the action, ought to be intituled *fully* in the action, as: Between { A. B., plaintiff, and C. D., defendant, } and as well the *Christian* as the *surnames* of *every* plaintiff and *every* defendant must be stated *in full*, and not abbreviated, or the affidavit will be insufficient.(*m*) And, therefore, an affidavit intituled "*Geo*. Shrimpton v. *Wm*. Carter, the elder, sued as Wm. Carter," the action being by *George* Shrimpton v. *William* Carter, is insufficient, and was rejected.(*n*) The title of the affidavit in an action in autre droit must also *fully* state *the right or character* in which the plaintiff sues, or the defendant is sued;(*o*) and if it merely add to the names "assignee, &c." without stating of whom, it will be insufficient;(*o*) and though the mere title "executor, &c." without showing of whom, has been common and may suffice, there being a distinction in this respect between an executor and an assignee (because there are several descriptions of assignees), it is at least safer to state of whom the party is executor.(*p*) In support of a motion to set aside a bail bond, on the ground of a mistake in the defendant's surname, the affidavit must be intituled in the proper name of party, and not in the name by which he was arrested; and if the defendant were in his affidavit or proceedings to adopt the wrong name by which he was sued, it would afford evidence

(*i*) *Urquhart* v. *Dick*, 3 Dowl. 17.

(*k*) See in general *ante*, vol. iii. 333.

(*l*) *Davis* v. *Stanbury*, 3 Dowl. 440.

(*m*) *Anderson* v. *Baker*, 3 Dowl. 107; 9 Legal Obs. 108; *Anderson* v. *Ell*, 3 Dowl. 73; *Clothier* v. *Ess*, 3 M. & Scott, 216; 2 Dowl. 731, and the objection is not waived by appearing to the rule and producing affidavits in answer; *Anderson* v. *Ell*, 3 Dowl. 73, S. P.

(*n*) *Shrimpton* v. *Carter*, 3 Dowl. 648.

(*o*) *Phillip* v. *Hutchinson*, 3 Dowl. 20; *Clark* v. *Martin*, 3 Dowl. 222; Tidd, 492, citing *Steyner* v. *Cottrell*, 3 Taunt. 327; *Bullman* v. *Cullow*, 1 Chitty's Rep. 726.

(*p*) *Clark* v. *Martin*, 3 Dowl. 222.

to the judge that he was known as well by one name as the other, and induce him to discharge the rule on that ground. (*p*) If it be intended to use the same affidavit in *two* causes, it seems, that since the abolition of stamps on proceedings in an action, such affidavit may be intituled at the top in both the actions, and then two affidavits will not be necessary. (*q*)

An affidavit should also be intituled in the *usual way*, viz. first stating the plaintiff's Christian and surname, and then the defendant's, and, therefore, "C. D. ats. A. B.," is bad, (*r*) and a fortiori, a transposition of names, as the Christian name "Mary Ann" for "Ann Mary," will be fatal. (*s*) And an affidavit defective in the title cannot be amended after the rule has been drawn up. (*t*)

5. Addition of deponent. (*u*)

The ancient rule in King's Bench of Mich. T. 15 Car. 2, reg. 1, A.D. 1663, ordered, "that the true *place of abode, and true* "*addition*, of every person who shall make affidavit in Court "here, shall be inserted in such affidavit." But there was not any such rule in Common Pleas, and it there sufficed to state his name and place of abode, omitting any statement of degree or mystery. (*x*) But Reg. Gen. Hil. T. 2 W. 4, r. 5, assimilating the practice of all the Courts, orders, that "the *addition* "of every person making an affidavit shall be inserted therein." The term *addition*, as here used, includes as well *place* of abode as *rank, degree, mystery, trade*, or *occupation*; (*y*) and the statement of these is now indispensable, and although it has in three cases subsequent to this general rule been held otherwise, (*z*) yet it seems the better opinion that even in an affidavit made by a *defendant* in a cause, and intituled in the cause, and describing the deponent as "the above named defendant," his addition of place and degree must be inserted, (*a*) but the rule is sufficiently complied with by a clerk who is the deponent, describing himself as "agent and collector of the said plaintiff," or as "late clerk, of &c.," although it do not describe his present abode. (*b*) The word "assessor" is not a

(*p*) *Finch* v. *Cocker*, 2 Dowl. 383; *Shaw* v. *Robinson*, 8 Dowl. & Ryl. 423, cited in *Nathan* v. *Cohen*, 3 Dowl. 371; and see 2 Crom. & M. 412; T. Chitty's Forms, 353; 3 Chitty's Plead. 901, (*a*)

(*q*) *Pitt* v. *Evans*, and *Pitt* v. *Jervis*, 2 Dowl. 226.

(*r*) *Richard* v. *Isaac*, 1 Cr. M. & R. 136, 709; 2 Dowl. 710, S. C., cited in *Clark* v. *Martin*, 3 Dowl. 222.

(*s*) *Poole* v. *Pembrey*, 3 Tyr. 387; *Price* v. *James*, 2 Dowl. 435.

(*t*) *Phillips* v. *Hutchinson*, 3 Dowl. 22.

(*u*) See in general *ante*, vol. iii. 333, 334.

(*x*) Tidd, 179; *Anonymous*, 6 Taunt. 73; Jervis's Rules, 43; and per Parke, J., in *Jackson* v. *Chard*, 2 Dowl. 469.

(*y*) *Semble;* and see 2 Dowl. 41, (*c*); as to *additions* in general, and consequences of mistake, see Tidd, 179, 493; 1 Chitt. Crim. L. 203 to 217.

(*z*) Per Bayley, B., in *Poole* v. *Pembrey*, 1 Dowl. 693; per Taunton J., in *Green* v. *Forster*, 2 Dowl. 191; and per Parke, J., in *Jackson* v. *Chard*, 2 Dowl. 469.

(*a*) *Lawson* v. *Case*, 3 Tyrw. R. 489; 2 Dowl. 40; 1 Cr. & M. 481, S. C.

(*b*) *Simpson* v. *Drummond*, 2 Dowl. 473; *Short* v. *Campbell*, 3 Dowl. 487; 1 Gale, 60.

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sufficient addition, but if introduced into an affidavit sworn also by other deponents, whose additions are correctly stated, their parts of the affidavit may be read. (c) As respects description of place, "merchant in the city of London," or of "Kennington in the county of Surrey," have been holden sufficient additions, (d) and "A. B. of Bath, in the county of Somerset, Esquire," is a sufficient description. (e)

6. The commencement.

The *commencement* or statement of the *deponent's swearing* must also be accurate, and where the affidavit run "maketh oath and said," (instead of *saith,*) the deviation from the usual form was considered fatal. (*f*) So an affidavit, "maketh and saith," omitting "*oath,*" was rejected. (*g*)

7. The body or substance of the affidavit.

Facts must be stated as positively as truth will admit, and not mere inferences or opinions.

The *substantial requisites* of an affidavit must necessarily vary in each case. The deponent must in every case state *facts* which, without conjecture or intendment, show that he is absolutely entitled to the interference of the Court as prayed. (*h*) Indeed, a principle in pleading (viz. that all allegations shall be taken most strongly against the party pleading them, because it is to be presumed he has stated them as strongly and favourably as practicable for himself,) (*i*) might also be applied to allegations in an affidavit. Thus, if a defendant apply for double costs under the Middlesex County Court Act, he must *expressly* swear that he was liable to be summoned to that Court, for otherwise the superior Court will rather presume the contrary; (*k*) so, if he seek to set aside proceedings, on the ground of his not having been served with process, his affidavits must state that he is the very person intended to have been made defendant in the action, for otherwise the contrary will be supposed, and then the application would be unnecessary. (*l*)

An affidavit should state facts *as positively* as a deponent consistently *with truth,* and after full consideration, can venture to swear; and if an affidavit merely state that the deponent "*believes* and *understands,*" &c. without stating the *grounds* of belief, no weight will be attached to it. (*m*) It is one of the most important and anxious duties of a practitioner, at the same

(*c*) *Nathan* v. *Cohen,* 1 Harr. 107; 3 Dowl. 370.

(*d*) *Wilton* v. *Chambers,* 1 Harr. 116.

(*e*) *Coffin* v. *Potter,* 2 Dowl. 785.

(*f*) *Howarth* v. *Hubbersty,* 1 Gale, 47; 3 Dowl. 455, S. C.

(*g*) *Oliver* v. *Price,* 3 Dowl. 261.

(*h*) See instances, *Fossett* v. *Godfrey,* 2 Dowl. 587; *Johnson* v. *Smallwood, id.* 588.

(*i*) Per Parke, B., in *Pearce* v. *Champneys,* 3 Dowl. 276.

(*k*) *Fossett* v. *Godfrey,* 2 Dowl. 587.

(*l*) *Johnson* v. *Smallwood,* 2 Dowl. 588.

(*m*) *Ex parte Tighe,* 2 Dowl. 148.

time that he may properly endeavour to obtain as strong an affidavit in favour of his client's interest as he can consistently with truth, to consider the possibility of the opponent indicting the deponent for perjury as respects any statement he may swear to, in cases when *two* persons who might swear to the contrary were present, and to caution the deponent to qualify his affidavit accordingly.

When it is essential clearly to establish a fact, as for instance a person's knowledge of some illegality in which he had been concerned, the affidavit should not merely swear to facts from which such guilty knowledge and illegality might be inferred, but should at least state the *deponent's* belief of the person's guilt, unless the facts as sworn are such as cannot lead to any other conclusion. (*n*)

In some cases express rules require particular points to be sworn.

Sometimes *express* rules prescribe that certain particular matters shall be sworn to in precise terms; as in support of an application to set aside proceedings on a bail bond, or an attachment against the sheriff, (*o*) when, if an application be on behalf of the *original defendant,* a good defence on the *merits* must be stated, and if the application be on behalf of the sheriff, or of the officer, or of the bail, (*p*) it must be so stated and sworn that the application was so made at his instance and expense *only, and without collusion with the original defendant.* (*q*) An affidavit in support of a rule, and founded on an irregularity not apparent on the face of an annexed document, should distinctly point out the irregularity complained of, in order that the opponent may know what he is required to answer. (*r*)

The genuine language of each deponent to be adhered to.

Every affidavit should be in the *genuine natural language of the deponent,* and it is morally incorrect, and may be exceedingly prejudicial, if a practitioner should so frame the affidavit of an illiterate or inferior person, as to appear in language superior to his station in life. And where there are several deponents, each should swear in his own peculiar terms; and if several affidavits be precisely in the same words, it will naturally excite suspicion that the whole were dictated by the practitioner or his clerk, and are not the genuine statements of the deponents themselves. Unquestionably in practice great skill

(*n*) *In re King,* 1 Adol. & El. 560; *R.* v. *Williamson,* 3 Bar. & Ald. 582.

(*o*) *Ante,* vol. iii.; *R.* v. *Sheriff of Middlesex,* 3 Dowl. 174.

(*p*) One of the bail may move on his own affidavit, denying collusion, although the other bail does not swear. *R.* v. *Middlesex,* 3 Dowl. 186.

(*q*) Reg. Mich. T. 49 G. 3, K. B.; 2 Bar. & Ald. 240; *Call* v. *Thelwall,* 1 Gale, 16; 2 Dowl. 444, S. C.; *R.* v. *Sheriff of Middlesex,* 3 Dowl. 174.

(*r*) Per Bayley, B. *Aliven* v. *Furnival,* 2 Dowl. 50.

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may be evinced in preparing affidavits strictly according with truth; but the least improper perversion, even of language, to make a better case for a client than the facts will warrant, is morally, if not legally, an offence very little less than subornation of perjury.

Calumnious and irrelevant statements and expressions to be avoided.

In every affidavit unnecessary *scandalizing* or calumniating expressions, as well as all other *impertinent*, or *irrelevant*, or *libellous* matter, or a general attack upon character, especially upon hearsay information, should be cautiously omitted, not only because the introduction of it might subject the party to a cross motion to have the objectionable statement struck out, but also because the Court will sometimes, on account merely of the introduction of such scandalizing matter, refuse costs, though in other respects the application may succeed. (*s*) When it may be requisite or advisable to attack the character of an adverse deponent or party, it may be advisable to swear that the deponent is ready to state particulars, if the Court so require or permit, as thus, "And this deponent further saith, "that he is well acquainted with the character of C. D., of, "&c., who hath made an affidavit in this cause, on, &c. And "that he this deponent doth not believe the statements of the "said G. D. therein, or either of them, to be true; and on the "contrary, this deponent well knows and believes the same to "be utterly false; nor would he this deponent, on any other "occasion, believe any statement made by the said C. D., on "his oath or otherwise. And this deponent further saith, "that he is ready and willing to state, distinctly and separately, "sufficient grounds and reasons for his, this deponent's, thus "swearing, if this honourable Court will require, or permit or "suffer him so to do."

Affidavits to be concise and not unnecessarily lengthy.

An affidavit should not in any *other respect* be unnecessarily lengthy; and if it be, as if in answer to a motion to set aside a judgment on the usual affidavit of merits, the affidavit in answer, contrary to the established practice, go into a long detail of facts to show, (especially when only argumentatively,) that the defendant has not a défence on the merits, although the plaintiff will be entitled to the costs of the application; yet the Court will direct the master, in taxing the costs, to disallow the unnecessary parts of the affidavit. (*t*) So in other cases where similar directions to the master have been given. (*u*)

When affidavits should state particular objections.

In some cases, as in support of an application complaining of

(*s*) *Thompson* v. *Dicas*, 2 Dowl. 95, 96; and see *Anonymous*, 2 Wilson, 20.

(*t*) *Heane* v. *Battersby*, 3 Dowl. 213.

(*u*) *Pitt* v. *Coombs*, 1 Harr. 14, n. (*a*); *Lewis* v. *Woolrych*, 3 Dowl. 602, S. P.

some taxable items in a bill of costs, it is necessary to specify in the affidavit *each objectionable item* and the facts which render it so, either in the affidavit in support of the application, or in the rule nisi, in order that the opponent may distinctly know what are the objections he is called upon to answer; and if a rule nisi in this respect be good in part, and insufficient as to the residue, the applicant will not have costs. (*x*)

When the presence of other persons should be sworn to.

When *several* other persons besides the deponent were present, when a material conversation or other fact took place, it may be advisable, although they do not join or make any affidavit on the subject, to state that fact and the names of such persons; and if they have been required to join in the affidavit, it may be expedient to state the terms of their refusal, and to swear according to the facts the deponent's belief why they have declined to concur, taking care, however, to avoid terms which might unnecessarily provoke them to swear the contrary, and when the facts will warrant, it may be advisable to add the deponent's belief, that if the persons would swear at all, they would corroborate his the deponent's statement.

Of swearing in anticipation and explanation of the deponent's probable statements.

When it is anticipated that a conversation or fact, which in one view, or on an ex parte statement, might be so distorted as to be unfavourable to the application, and that the opponent is capable of attempting so to misrepresent, then it may be advisable in the affidavit in support of the application, to notice such conversation or fact, however unfavourable, and then to give its full and favourable explanation; for otherwise the opponent swearing last, and no supplemental affidavits being admissible, might so misrepresent or garble the conversation or fact, or swear to such prejudicial inference, as to endanger the result of the application upon a collateral matter, though substantially the applicant might be entitled to the fullest relief.

Of swearing to merits.

In support of a motion on behalf of a *defendant*, to set aside any proceeding for *irregularity*, no affidavit of *merits* is requisite, if the ground of objection be clearly well founded; (*y*) but if the irregularity be doubtful, and in all cases when the facts will warrant, it is advisable that the affidavit state, "And this de-" ponent further saith that he is advised, (*z*) and verily believes, " that he has a *good and sufficient defence to this action on the*

(*x*) *Aliven* v. *Turnival*, 2 Dowl. 49.
(*y*) *Williams* v. *Williams*, 2 C. & M. 473; 2 Dowl. 350, S. C.
(*z*) This should only be stated when in fact such advice has been given, and it would suffice to swear only to the deponent's belief.

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merits;" (not merely that he hath merits, or that he has a good defence.) (*a*) And upon such affidavit of merits, though the defendant might fail in his objection, he would be let in to try the cause on just terms. (*a*)

An affidavit of a defence on the merits must in general in terms add "to *this action,*" and "on the *merits,*" or it will not be received, or at least acted upon; (*b*) and where the affidavit, deviating from the usual language, stated that "the defendant had a good and *meritorious* defence to this action," the Court held it insufficient, but gave time to obtain a better affidavit; (*c*) and an affidavit that the defendant has merits to defend, is clearly insufficient, as rather importing that the defendant has to defend or answer an action on the merits against him. (*d*) If, however, the affidavit distinctly state *facts* which of themselves can lead to no other conclusion than that there is a defence on the *merits,* then it is not absolutely necessary, though always *safer,* to swear in terms "that the defendant hath a good and sufficient defence on the merits to this action;" (*e*) and, therefore, where the affidavit incorrectly was "that the defendant had a good defence to the action," (omitting on the merits,) but added the ground thus: "inasmuch as the principal has paid to the plaintiff sufficient money to exonerate the defendant from his covenant," such affidavit was holden sufficient, as disclosing in effect that there was a sufficient defence on the merits. (*f*) In general an affidavit of merits must be made by a defendant himself, or his attorney, or the clerk of such attorney *who swears he has conducted the defence from the earliest stages in the cause,* and who will swear positively that he is fully acquainted with the facts relating to the action. (*g*) But an agent in London to the defendant's attorney in the country, may sufficiently swear to his belief of merits from instructions received from the country attorney, as by an affidavit stating "that from the instructions this deponent has received from E. F. of, &c. attorney for the defendant, and for whom this deponent is agent in this cause, and which instructions this deponent believes to be correct and true, this deponent verily believes the said defendant hath a good defence to this action

(*a*) *Williams* v. *Williams,* 2 Cr. & M. 473; *Tate* v. *Bodfield,* 3 Dowl. 218; *Lane* v. *Isaacs, id.* 652; and see *In matter of King,* 1 Adol. & El. 560.

(*b*) *Johnson* v. *Nevison,* 2 Dowl. 260, 261; *Tate* v. *Bodfield,* 3 Dowl. 218; *Lane* v. *Isaacs, id.* 652; *Williams* v. *Williams,* 2 Cr. & M. 473.

(*c*) *Bower* v. *Kemp,* 1 Crom. & Jerv. 288; *Westerley* v. *Kent,* 1 Tyr. R. 261; *Lane* v. *Isaacs,* 3 Dowl. 652.

(*d*) *Pringle* v. *Marsack,* 1 Dowl. & Ryl. 155; and see *Lane* v. *Isaacs,* 3 Dowl. 652.

(*e*) *Johnson* v. *Berrisford,* 2 Cr. & M. 222; and see *In matter of King,* 1 Adol. & Ell. 560; and *Attorney General* v. *Hull,* 2 Dowl. 111.

(*f*) *Johnson* v. *Nevison,* 2 Dowl. 260.

(*g*) *Morris* v. *Hunt,* 1 Chitty's Rep. 97.

on the merits." (*h*) The term *merits* in an affidavit of this nature is to be read in a technical sense, and is not to be understood to be confined to a *strictly moral* and conscientious defence, and therefore a sufficient defence on the merits might be safely sworn to, when the defence rests alone on a legal or technical objection, as the statute against frauds or usury, or the statute of limitations.

8. Deponent's signature to affidavit.

If an affidavit purport to be *signed* by a deponent, it will constitute no objection that it is signed in a foreign character, and that there is no statement in the jurat to show that the deponent is a foreigner, and that the writing in question is his signature. (*i*)

9. Before whom sworn. (*k*)

We have seen that under 11 G. 4 and 1 W. 4, c. 70, s. 4, each of the fifteen judges, without regard to the particular Court to which he may be attached, is now competent to have administered before him every description of affidavit in actions over which the Courts have *common*, i. e. concurrent jurisdiction, and consequently all personal actions; (*l*) and the Reg. Gen. Hil. T. 2 W. 4, r. 4, orders that if an affidavit be sworn before a judge of the Court, in which an action is depending, it may then be received, though not intituled of that Court, but not in any other Court, unless intituled in such Court; and therefore it was held to be no objection to an affidavit to ground an attachment against a witness for contempt in a cause depending in the Court of Exchequer, and which affidavit was intituled "In the Exchequer," that it was sworn before a judge of the Court of Common Pleas. (*m*)

The Reg. Gen. Hil. T. 2 W. 4, rule 6, directs, that where an agent in town, or an attorney in the country, is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail. The object and use of this rule has been explained by Mr. Jervis in his valuable note in his collection of rules. (*n*) With respect to *commissioners*, it seems that during the assizes their power to

(*h*) *Schofield* v. *Huggins*, 3 Dowl. 427.

(*i*) *Nathan* v. *Cohen*, 3 Dowl. 370; 1 Harr. 170, S. C.

(*l*) *Ante*, vol. iii. 22, 23.

(*m*) *Phillips* v. *Drake*, 2 Dowl. 45.

(*n*) Jervis's Rules, 43.

administer an oath in the town where the assizes are holden is suspended, and it must be made before one of the judges upon the circuit; but if the deponent be there present, the judge will permit the affidavit to be resworn before him. (o)

10. Of the jurat.

We have noticed certain requisites in the jurat of every affidavit. (p) If the date of an affidavit in support of a rule in the jurat be January, 1833, instead of 1834, it will be fatal, and not waived by the mere act of producing affidavits in answer, and previously arguing on the merits. (q) It has been held that an alteration in the jurat in the date of an affidavit, by writing one figure over another, does not constitute an *erasure* or *interlineation*, within the meaning of the rule of Court; (r) and where the names of the deponents were omitted in the jurat, through the inadvertence of the judge's clerk, the Court allowed it to be amended. (s) Although an illiterate person be sworn *in Court*, the fact of the affidavit having been read over to him and his understanding it must be stated in the jurat as well as when it is sworn before a commissioner; for although the Reg. Easter T. 31 G. 3, only extends in words to affidavits sworn before a *commissioner*, yet the former affidavit is equally within the mischief intended to be prevented by the rule, since it is notorious that the Court do not themselves administer the oath or examine the party as to his intelligence or otherwise. (t)

11. At what time an affidavit must be sworn, produced and filed.

The general rule of practice is not to allow an affidavit to be sworn and filed in support of a rule nisi, after such rule has been moved for and obtained; (u) indeed, by express rule of the King's Bench, all affidavits in support of a rule must be produced *in a complete state* at the time of making the motion, and filed or deposited with the proper officer, before any rule founded thereon can be drawn up; (x) and formerly, in the King's Bench, when one of the judges in the afternoon left the Court, and an affidavit was in fact sworn before him at chambers, after the rising of the full Court, the clerk of the rules would not draw up a rule nisi of that day; and it is certain that a party, having obtained a rule nisi, cannot, without with-

(o) *Bartlett* v. *Leighton*, 3 Car. & P. 408.

(p) *Ante*, vol. iii. 339; *Doe* v. *Roe*, 1 Chitty's R. 228; *Wood* v. *Stephens*, 3 J. B. Moore, 236; Tidd, 294, 295.

(q) *Barham* v. *Lee*, 4 M. & Scott, 327; 2 Dowl. 779.

(r) *Jacob* v. *Hingate*, 3 Dowl. 456; and *Atkinson* v. *Thomson*, 2 Chitty's R. 19, S. P.; Tidd, 495; see Reg. Trin. Term, 1 G. 4, Exchequer, 8 Price, 501; *Wellings* v. *Marsh*, 11 *id.* 509; Reg. Mich. 37 G. 3, K. B. 7 T. R. 82.

(s) *Ex parte Smith*, 2 Dowl. 607.

(t) *Haynes* v. *Powell*, 3 Dowl. 599.

(u) *Ditchett* v. *Tollett*, 3 Price, 259.

(x) Reg. Hil. T. 36 G. 3, K. B.; *Williams* v. *Reeves*, 2 Chitty's R. 218.

drawing his motion and moving it again after an affidavit has been sworn or resworn, effectually make use of any affidavit sworn or not produced to the officer, until after the rule was first obtained. (y) When, however, counsel had inadvertently, on moving for a rule to set aside an award, stated a fact to the Court upon the erroneous supposition that it was sworn in the affidavit in his possession, but afterwards discovered that it was not so sworn, the Court on the *next day* permitted the counsel to file a fresh affidavit, provided it was sworn and filed the same night; (z) and sometimes, as in motions to stay proceedings on a bail bond, or for setting aside an attachment against the sheriff on payment of costs; if on showing cause it be objected that the affidavit on which the rule nisi was obtained, was informal, as on account of not swearing in a strictly formal manner to a defence on the merits, or that the application is at the instance of the bail, the Courts will enlarge the time for discussing the rule, and permit a supplementary affidavit to be produced and filed. (a)

Filing.

In K. B. the stat. 29 Car. 2, c. 5, required *country* affidavits to be *filed* before they were read, and the rule in K. B., of Mich. T. 9 G. 2, required them to be *filed* in such *convenient time*, that copies might be duly made, and delivered to the party filing the same; but in modern practice country as well as town affidavits are not filed until immediately after the rule nisi has been moved for and granted. So in C. P. Reg. Trin. T. 2 W. & M. reg. 2, required all affidavits to be filed before they were read in Court; but this has long ceased to be observed in practice; and it is no longer usual *to read* the affidavits in or to the Court. (b) In the Exchequer, by Reg. Hil. T. 1 & 2 G. 4, all affidavits to be read on every *special* application to the Court were required to be filed one clear day before the application be made; (c) but that rule did not extend to a mere affidavit of service of notice of motion; (c) and in practice the clerks in the Court of Exchequer do not observe the rule, excepting as relates to affidavits to be used on showing cause against enlarged rules. (d)

(y) *Tilley* v. *Henley*, 1 Chitty's R. 136; *Shaw* v. *Mansfield*, 7 Price, 709.

(z) *Perrin* v. *Kymer*, 1 Har. & Wol. 20.

(a) Chitty's Summary Prac. 103; the Reg. Gen. Hil. T. 2 W. 4, r. 9, only prohibits a supplemental affidavit to supply a defect in an affidavit to hold to bail.

(b) In A. D. 1816, in K. B., the practice of any officer or counsel reading the affidavits verbatim to the Court had ceased, excepting that Topping, K. C., still insisted, on weighty or important cases, in continuing the practice; and on the crown side, where parties are brought up for judgment, the affidavits for and against the prosecution are still usually read to the Court.

(c) 9 Price's Rep. 88; Price's Prac. 306.

(d) Chitty's Sum. Pract. 104.

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Although it is certainly not in a legal view essential to the crime of perjury that the affidavit on which it has been committed should have been *filed*, and it is obvious that the moral and legal guilt is complete the instant that a party has deliberately sworn to a non-existing fact, with intent that his affidavit shall thereafter be used; (e) yet in order to *secure the evidence* of the crime, and prevent the destruction or suppression of such evidence, it is essential that each Court and judge should, immediately an affidavit has been *used*, impound and detain it; and accordingly it is the practice of all the superior Courts to require *to be filed* every affidavit that has been used, (whether successfully or not, i. e. whether a rule nisi has or not been granted); and indeed formerly, when there was comparatively little business in the Courts, the affidavits were handed into the Court, and read by one of its officers, and then kept by him; and according to the present practice, if, upon application, an attorney neglect to file the affidavit, the Courts will by rule nisi compel him to do so; (f) and indeed counsel who have received the original affidavit with the brief to move, ought invariably, immediately after he has moved, to hand the affidavits with the brief carefully indorsed, with the terms of the rule as pronounced by the Court, to the officer, to be filed, and in no case to return them to his client. Perhaps the only exception is when the Court intimate to the counsel that the affidavits may be amended, and that then he may move again; which permission imports an exception as regards an immediate filing of the affidavit.

12. Documents to be annexed to and exhibited with affidavit.

When the application is in part founded on the terms of any written or printed *document*, the original, or a copy, or if very long, an extract from the important part, should be annexed or incorporated in the affidavit, and the rule nisi should be drawn up on reading such document, as well as the affidavit; (as thus "on reading the declaration in this cause, and the affidavit of A. B. and others, it is ordered, &c."); for otherwise the Court cannot, on the discussion of the rule, refer to the document; and if the affidavit should appear to be defective in its terms, there would be no adequate materials before the Court unless the document were so annexed or referred to. (g) But in a late case, in order to save expense, a rule nisi for a new inquiry of damages before the under-sheriff

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(e) Rex v. [illegible], 7 T. R. 315.

(f) Ex parte [illegible], 3 Dowl. 92; [illegible]

(g) Hemorth v. Hubbersty, 3 Dowl. 455, 458; 1 Gale, 67; S. C. nom. [illegible]

was granted on reading an *affidavit, verifying* the under-sheriff's notes, and not on reading such notes; and which having been objected to by counsel, Parke, B., said, " It was done to save expense; if the rule had been drawn up otherwise, office copies of the notes must have been taken."(*h*)

We have in a previous page stated what documents should be annexed or referred to on moving to set aside a writ or a copy, or the mode or place of service.(*i*) In moving to set aside the copy of a writ of capias on the ground of irregularity, the writ having been indorsed " Old Jewry, London," and the copy only Old Jewry, omitting London, it was objected that the rule nisi should have been drawn up on reading *office copies* of the documents, and that it should have been sworn that they had been examined; but the Court held that an affidavit, merely stating " that the deponent had examined the copy of the capias delivered to the defendant with the original capias in the sheriff's office, and that the paper writing annexed was a true copy of the indorsement," was sufficient.(*k*) In an affidavit, on which to move to set aside a judge's order, it is not necessary to annex or state a full copy of the order; but it suffices to state its substance.(*l*)

13. Affidavits previously used when they must be re-sworn or not.

Affidavits sworn and used on a prior occasion, in opposition to a rule then before the Court, and in which the allegations (*now become material*) might then have been immaterial, cannot be used without *re-swearing*, in opposition to a *subsequent* rule, on which they had so become material; although the same question might have been intended to be raised on the first rule, and was actually raised on the second.(*m*) But we have seen that a preliminary affidavit, if intituled in two separate causes, may be used in both;(*n*) and in general affidavits, previously used or filed between the same persons on a prior occasion, may be used in support of a fresh motion, provided they be expressly referred to in the rule nisi, " as upon reading the affidavit, &c.," but not otherwise.(*o*)

14. Consequences of affidavit not being sufficient in first instance.

As a general rule, parties ought to come prepared with proper affidavits in the *first* instance; and if a rule has been discharged or disposed of on account of the insufficiency of the

(*h*) *Stephens* v. *Pell*, 2 Dowl. 629.
(*i*) *Ante*, vol. iii. 277 to 279.
(*k*) *Smith* v. *Pennell*, 2 Dowl. 654.
(*l*) *Shirley* v. *Jacobs*, 3 Moore & S. 67, note (*b*).
(*m*) *Quelby* v. *Boucher*, 3 Dowl. 107.
(*n*) *Pitt* v. *Evans*, and *Pitt* v. *Jervis*, 2 Dowl. 226.
(*o*) *De Woolf* v. ——, 2 Chitty's R. 14.

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affidavits, a party is not in general (unless the Court reserved leave) allowed to come again upon additional or amended affidavits.(p) But the above rule is not so strictly adhered to as to prevent a counsel who has, on arguing a practical rule, been taken by surprise, and inadvertently not stated a material point or decision in his favour, from afterwards praying the Court to allow the rule to be opened; and this the Court will sometimes permit.(q)

15. When or not an amendment in affidavit is permitted, or supplemental one received.(r)

Although a party after *moving* may, upon ascertaining that his affidavit is defective, *withdraw* his motion, and, after amending and *re-swearing* his affidavit, may renew his motion, *if in time*, for the particular purpose; yet an affidavit cannot in general be amended after a rule nisi has been obtained, so as to operate *nunc pro tunc;* but, after re-swearing, a fresh rule must be obtained.(s) The Court will not, however, when a rule nisi has been obtained in support of a *mere technical* objection, and which rule, on showing cause, has been discharged on account of a defect in the affidavit on which the rule nisi was granted, allow it to be renewed, or any new motion made on an amended affidavit, or even a fresh affidavit.(t) Though in cases of affidavits in support of motions to set aside proceedings on a bail bond, or an attachment against a sheriff, or otherwise, parties may be let in to try on the merits; if on showing cause, the opponent object to the affidavit, that it neither states a defence on the merits, nor that the application is on behalf of the bail or sheriff or his officer, the Court will sometimes allow time to file a supplemental affidavit.(u) So if an affidavit *in answer* to a rule nisi, on showing cause, be objected to as defective, the Court may enlarge the rule in order to afford an opportunity of amending such affidavit.(x) In case of bail also, if the affidavit of justification be defective, the judge may give time for justifying and amending the affidavit in the meantime.(y)

16. When or not objection waived.

If the affidavits in support of a rule are insufficient, as being

(p) *Preedy* v. *Macfarlane*, 1 Gale, 20; 3 Dowl. 458, S. C.; and see Reg. Hil. K. B., 3 Jac. 1, A. D. 1605, stated, *post*, 574.

(q) Reg. K. B. Hil. T. 3 Jac. 1; *Kibblewhite* v. *Jeffreys*, 1 Chitty's R. 142; *Tripp* v. *Bellamy*, 5 Price's R. 384; *Oakes* v. *Albin*, M'Clel. Rep. 582.

(r) See as to *amending* an affidavit in general, 2 Arch. K. B., 4th edit. 959.

(s) *Phillips* v. *Hutchinson*, 3 Dowl. 22; *Anderson* v. *Ell*, *id.* 73.

(t) *Finch* v. *Cocker*, 2 Crom. & Mees. 412.

(u) *Ante*, 547; *Bower* v. *Kemp*, 1 Crom. & Jer. 288; *Westerby* v. *Kent*, 1 Tyr. 261.

(x) *Anderson* v. *Ell*, 3 Dowl. 73.

(y) *Treasurer's Bail*, 2 Dowl. 670.

wrongly intituled, the opponent does not, by appearing to the rule and producing affidavits in answer, waive the objection; but may at any time before the rule has been disposed of state the objection to the same, and discharge the rule or not, according to the validity of his objection.(z)

17. Of delivering copies of affidavits to opponent's attorney.

Whenever the applicant is anxious for despatch, as in cases of imprisonment and execution, it may be advisable as early as possible to deliver to the opponent's attorney copies of affidavits made, or even proposed to be made, which would afterwards remove all pretence for delay in discussing the merits of the application, and in cases of affidavits necessarily imputing discreditable misconduct to a professional person, that candour may save his exposure, and perhaps induce him to make remuneration without delay. But there seems no provision for enforcing the payment of the costs of such copy of affidavits even in case the applicant succeeds.

18. Of opponents taking office copies.

We have seen that the Reg. Hil. T. 1 & 2 Geo. 4, in the Exchequer, required that all affidavits in support of every *special* application should be *filed* one clear day before the application to the Court be made, so as to afford the opponent an opportunity of obtaining office copies, and showing cause in the first instance, but that this rule is not observed in practice,(a) and that when *notice of motion* is required to be given, the filing of any affidavit in support of the application shall also be mentioned at the foot of the notice, to enable the parties to obtain a copy therefrom, but it is stated that this regulation is not strictly observed in practice.(a)

In some cases a party, before showing cause, must of *necessity* take office copies of the affidavits filed in support of the rule, in order that he may answer the same with particularity and certainty when he has not obtained copies from the opponent; and anciently it was supposed that a party was not at liberty to show cause, unless he had taken and paid for *office copies*, and in a revenue cause in the Exchequer this was considered the indispensable practice;(b) but in a late case in the King's Bench, the Court, after referring to the officer, said that such practice had not been adhered to of late years;(c) and where the sheriff had obtained a rule for relief under the inter-

(z) *Clothier* v. *Ess*, 3 M. & Scott, 216; 2 Dowl. 731.

(a) 9 Price's Rep. 88; Price's Prac. 306, in note. See form, *post*, 571, note (r).

(b) *In re Jeffery*, 1 Crom. & M. 71.

(c) *Pitt* v. *Coombs*, 4 Nev. & Man. 535; 1 Harr. & Wol. 13.

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pleader act, it was held, that the claimant might appear to such rule without taking office copies of the affidavits on which the rule was obtained, because he appeared merely to substantiate his *own claim*, which might be wholly independent of that of the execution creditor.(d)

19. Affidavits in answer to a summons or rule nisi.

In preparing *an affidavit in answer* to one or more affidavits that are lengthy, or contain numerous allegations, the opponent's attorney will find it expedient to have a copy of the affidavits in support of the rule, made in a column on the right hand side of half pages of draft-paper, with small spaces between each paragraph, and then to request the person, who it is expected will effectually answer the affidavits in support of the rule, to write, in an opposite left hand blank column, his genuine distinct answers to each part of the opponent's statement, in as strong language as he conscientiously can use, stating time and place and qualifying circumstances, and whether any third person, and whom, was present, who will corroborate his qualification or contradiction. The opponent's attorney should then examine carefully *whether every distinct allegation has, in the proposed affidavit in opposition, been noticed, and completely answered*, according to the facts; and then, in company with the proposed deponent, should see that each allegation is placed in juxta position, or well arranged, and sufficiently connected in the narrative, at the same time carefully abstaining from any substantial alteration in the statement or the language of the opponent, excepting what might arise from a caution to him against swearing *too positively*, when he, perhaps, only has a faint recollection of the transaction, or might subject himself to a prosecution for perjury on the prosecution of a vindictive opponent.

Affidavits in answer should not be unnecessary lengthy, and the Court would direct the master not to allow to the party, though he succeed, the costs of unnecessary statements,(e) on which ground, if the defendant has sworn positively to merits, the plaintiff has no right in answer to go into a long statement of facts negativing merits, for the Court will not, after the defendant's positive affidavit, decide upon the merits as disclosed by the affidavits, but, at least, let him in upon terms to try before a jury, the proper tribunal for deciding upon disputed facts.(e)

(d) *Mason* v. *Redshaw*, 2 Dowl. 595.
(e) *Hearne* v. *Battersby*, 3 Dowl. 213; *ante*, 542.

20. Time of swearing the same.

At all events, affidavits in opposition to a rule nisi should, as matter of *convenience, be sworn and delivered with the brief to oppose the rule, sufficiently early on the day before that named in the rule for showing cause*, so as to enable such counsel sufficiently to examine the affidavits on each side and authorities that may be applicable, and prepare observations, and these sufficiently early to enable such counsel as usual, in courtesy to send his clerk with such original affidavits to the counsel in support of the rule, with an intimation of the name of the counsel who will show cause, and a request to have the affidavits returned before the day of showing cause. Indeed, to prevent delay, the affidavit as well in support of as against the rule, or copies thereof, should be delivered to the counsel on each side as soon as practicable, for unless affidavits in opposition have been shown to counsel in support of the rule a reasonable time before such rule is brought on for discussion, the Court will direct the discussion to stand over.

An affidavit on showing cause, although sworn after the day appointed in the rule nisi, may as a general rule be used; (*f*) and, in general, when a rule has been enlarged, as from Trinity to Michaelmas Term, affidavits filed a week before the latter term are in time. (*g*) But if the rule specify a particular time within which affidavits are to be filed, it must be complied with, and in general affidavits sworn afterwards cannot be read. Thus, in the latest reported case on the subject, where a rule was enlarged to a subsequent term, on the usual terms of filing the affidavits a week before the term, the Court refused to hear affidavits filed afterwards. (*h*) But there are instances of deviation from that strict rule under special circumstances, as inevitable accident; (*i*) in which case, however, there should be a special motion before the day of showing cause for leave to file the affidavit nunc pro tunc. (*i*)

The practice on the revenue side of the Court of Exchequer, requiring a defendant to file his affidavit against a rule one day before the rule comes on for argument, is not strictly enforced, and it has been doubted whether such practice ever applied to a motion to enlarge a rule. (*k*)

After showing cause against a rule, counsel cannot come

(*f*) *Hicks* v. *Marreco*, 3 Tyr. 216; *Brame* v. *Hunt*, 2 Dowl. 391; *Hoare* v. *Hill*, 1 Chitty's Rep. 27, (*a*); *Tilley* v. *Henly*, id. 136; Tidd, 501.

(*g*) *Johnson* v. *Marriot*, 2 Dowl. 343, 346; 2 Cr. & M. 183, S. C.

(*h*) *Turner* v. *Unwin*, 1 Harr. & Woll. 186.

(*i*) Reg. Mich. T. K. B. 36 Geo. 3; *Hoar* v. *Hill*, 1 Chitty's Rep. 27; *Tilley* v. *Henly*, id. 136; *Harding* v. *Austen*, 8 J. B. Moore, 523; Tidd, 9th edit. 501.

(*k*) *Attorney General* v. *Jayes*, 2 Cromp. & J. 352.

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again on another day, even in the same term, with better affidavits. (*l*)

21. Affidavit in answer, when, if defective merely in form, may be amended.

If affidavits *in opposition* to a rule nisi be defective in a mere technical matter, the Court may give leave to amend and reswear the affidavit, and will enlarge the rule for that purpose. (*m*)

SECT. III.—OF SUMMONSES AND JUDGE'S ORDER.

1. Summary, applications by summons and judge's order, or by petition and order, or by motion and rule nisi, and rule absolute.

The summary modes of taking advantage of *irregularities*, and of obtaining the decision of one or more of the learned judges in very numerous other cases, are either by *summons*, returnable before a judge at chambers, and obtaining his *order* thereon, (sometimes also by *petition*,) or by *motion* to the *Court* in banc, or in K. B. to the Practice Court, and obtaining a *rule nisi*, and afterwards causing the same to be made absolute. The proceedings by *summons before a single judge* have been frequently adverted to in previous pages, (*n*) and have been fully examined in other works; and in one in particular, where Mr. Bagley has very ably collected the law and proceedings relating

(*l*) *Kibblewhite* v. *Jeffreys*, 1 Chitty's Rep. 142; *Tripp* v. *Bellamy*, 5 Price, 384; *Oakes* v. *Albin*, M'Clel. Rep. 582; Tidd, 501; *ante*, 550, *post*, 574.

(*m*) *Anderson* v. *Ell*, 3 Dowl. 73.

(*n*) *Ante*, vol. iii. 19 to 35.

to the chamber practice of the judges.(*p*) We shall here only attempt to take a concise view of the subject, and of the most recent decisions not before collected.

2. When or not application should be by summons.(*q*)

In the first chapter of this volume we have already considered much of the jurisdiction and practice of a judge at chambers; and reference to that part of the work must be made for many points connected with this section.(*r*) In some cases, either by express enactment or rules of Court, the application *must* be by *summons:* thus Reg. Gen. Hil. T. 4 W. 4, r. 6, directs a summons shall be obtained for striking out a second count for the same cause of action;(*s*) and since the uniformity of process act, 2 W. 4, c. 39, and Reg. Gen. Mich. T. 3 W. 4, reg. 10, objections to *irregularities* in process, *arising in vacation*, should be taken by summons, unless the objection arise within eight days preceding the following term.(*t*) There are other cases where the application may either be to the Court in banc, or to the Practice Court of K. B., or to a single judge. It will be obvious, that in all cases when the object of a party might be attained by *summons* and a judge's order, it would be improper for either party, whether plaintiff or defendant, (at least in the first instance, and without previous application to a judge,) to occasion the expense incident to a motion to the Court;(*u*) and therefore, notwithstanding the plaintiff had given the defendant notice of motion, unless he would deliver to the plaintiff a copy of an agreement of demise at his expense, so as to enable him to declare, and the defendant had improperly neglected to comply, although the Court made absolute a rule nisi for the delivery of such copy, yet they refused to give the plaintiff immediately and absolutely the costs of the application, but directed that they should only be costs in the cause, (i. e. to be received by the party ultimately successful); for although the defendant had no right to impose terms on the plaintiff, and had the application been made before a judge at chambers, it would have been granted as a matter of course; yet if the

(*p*) See Bagley's Chamber Practice, *per tot.*

(*q*) See in general as to summonses and judge's orders, *ante*, vol. iii. 19 to 36; Tidd, 9th edit, 469, 509 to 511; 2 Arch. K. B., 1007 to 1013, 4th edit.; 2 Arch. C. P. [72], 316 to 319.

(*r*) *Ante*, vol. iii. 20 to 36.

(*s*) *Ante*, 458.

(*t*) *Ante*, vol. iii. 22.

(*u*) *Ante*, vol. iii. 19 to 36; and as to proceedings in general by *summons* and *judge's order*, see Tidd, Prac. 9th edit. 469, 509 to 511; 9 Arch. K. B., 4th edit., 1007 to 1013; 2 Arch. C. P. [72] 316 to 319; Price's Prac. 313 to 318, Bagley's Chamb. Prac. *per tot.*, and for a list of the numerous cases in which a judge can interfere, see *id.* index, title "*Order.*"

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Court, on the motion, had given costs absolutely, it would encourage parties to come to the Court, instead of the other less expensive remedy; (x) and in another case, where the application had been improperly made to the Court instead of a judge, the Court allowed the applicant only the same costs as if he had applied to a judge at chambers; (y) and in another case the rule was made absolute without any costs. (z)

Hence it is of essential importance to practitioners to be well informed when or not a judge at chambers has jurisdiction to interfere, and in cases of doubt first to apply to him. (a) An application for a copy of a document, to enable the plaintiff to declare, should always be to a judge at chambers; (b) so an application that an attorney's bill be taxed, and he pay over certain monies, was refused, because it should have been made at chambers; (c) and an application, that an attorney be changed, must also be made at chambers, and not to the Court. (d) It seems however from the above authorities, that when inadvertently a rule nisi has been granted in a case where the application should have been made at chambers, the Court will not discharge it, but decide upon the matter of the rule when before them, though they will thus distinguish as to the costs. (e)

3. Summons of and to be returnable before *what* judge.

We have seen that as regards chamber practice and a *summons*, the latter may, under 11 G. 4 and 1 W. 4, c. 70, s. 4, be obtained from and returnable before *either* of the fifteen judges, without regard to the Court to which he is attached or in which the action is depending; provided all the three Courts have *common* or *concurrent* jurisdiction over actions or matters of that description. (*f*) It is usual, however, (excepting during the circuits, when only one judge remains in London,) to apply to a judge of the particular Court in which the action is depending; because he will probably be most conversant with the particular practice of his own Court, which may still vary in some few particulars from the practice of the

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(x) *Reid* v. *Coleman*, 4 Tyr. 274; 2 Cromp. & M. 456; 2 Dowl. 344, S. C.

(y) *Vaughan* v. *Trewent*, 2 Dowl. 299.

(z) *Wright* v. *Cross*, 2 Dowl. 651, note (a).

(a) See in general, *ante*, vol. iii., chap. i., *per tot.*, and Bagley's Chamb. Prac.; and see the list of summonses, 2 Arch. K. B., 4th edit., 1008 to 1011, and list of motions and rules, *id.* 999 to 1007.

(b) *Vaughan* v. *Trewent*, 2 Dowl. 299; *Wright* v. *Cross*, *id.* 651, note (a); *Read* v. *Coleman*, 2 Dowl. 354; 4 Tyr. 274; 2 Cr. & M. 456, S. C.

(c) *Bassett* v. *Giblett*, 2 Dowl. 650.

(d) *Rex* v. *Sheriff of Middlesex*, 2 Dowl. 147; when not necessary in case of partner succeeding one who has retired, *Farley* v. *Hebbs*, 1 Har. & Wol. 203.

(e) *Supra*, 555, 556.

(*f*) *Ante*, vol. iii. 22 to 24.

other Courts. And the 1 G. 4, c. 55, s. 5, gives power to a judge of either of the superior Courts on the circuit to make an order, although in a cause depending in a Court of which he is not a judge. The 4 & 5 W. 4, c. 62, s. 24, appears also to enable any judge of either of the Courts at Westminster to dispose of any matter depending in an action in the Common Pleas at Lancaster by summons and order, that may usually be determined upon by that proceeding. (g) If a summons or an order has been refused by one judge, it is considered extremely improper to attempt to obtain an order from *another* judge. (h)

4. Summonses during vacations.

Pending each of the *vacations*, when the Court in banc are not in any case now sitting, excepting on a trial at bar, and then only for that particular purpose, it has been considered that since the uniformity of process act, 2 W. 4, c. 39, s. 11, with a view of expediting proceedings, authorizes almost every description of proceeding during the vacation, a judge at chambers impliedly and of necessity has power to act and decide in many cases where before it was not the practice for him to interfere; (i) and certainly when any *irregularity* occurs in vacation, unless on the very eve, and at all events within eight days of any succeeding term, there must be an *immediate* application to a single judge to set the same aside as soon as the defendant has any intimation of the objection: (k) and although it has been doubted whether a judge can interfere in vacation absolutely to set aside a judgment or rule supposed to have been pronounced by the Court in banc, yet now in practice a single judge frequently does so interfere in cases where judgment has been signed by the plaintiff's attorney for want of a plea, or on other technical objections; and at all events a judge ought to be applied to immediately to *stay the proceedings* until the second day of the next term, so as to afford an opportunity for moving the Court on the first day, in case he declines to set aside the judgment. (l)

5. Of application by summons, when to be supported by affidavit, and of obtaining an *express* stay of proceedings.

In general, in order to obtain a summons, the applicant prepares a *memorandum in writing*, stating the precise terms in which he wishes the summons to be framed; and in ordinary cases the judge's clerk immediately prepares and delivers a proper summons to the applicant without troubling the judge

(g) *Terns* v. *Fitzhugh*, 3 Dowl. 278, a decision on the twenty-sixth section; and see *Potter* v. *Mass*, 3 Dowl. 432.

(h) *Wright* v. *Stevenson*, 5 Taunt. 850; 1 Chitty's R. 124.

(i) *Ante*, vol. iii. 21, 22.

(k) *Ellison* v. *Roberts*, 4 Tyr. 214; 2 Cromp. & M. 345, S. C.; *Cox* v. *Tullock*, 3 Tyr. 578, 591.

(l) *Rutty* v. *Arbar*, 2 Dowl. 36.

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upon the subject until the hearing, in case of opposition. But when the application is novel or urgent, and supported by an affidavit, it may be advisable to see the judge in the first instance, and produce the affidavit, and state the precise object of the application, especially when an immediate stay of proceedings is essential. In such a case a very concise but explicit affidavit should be sworn, stating the facts as strongly and positively as the truth will permit, and then the applicant's attorney should, after stating in writing the terms of the proposed summons, see the judge, and produce to him such affidavit, and pray that a stay of proceedings *may be embodied in the summons*, (*l*) because otherwise some adverse proceedings may ensue before the hour when the summons will be returnable. (*m*) Having obtained such summons, he should as speedily as practicable serve a copy on the opponent's attorney, offer to show the original, and leave with him a copy of the affidavit, with a written request that he may be favoured a reasonable time before the attendance on the summons, with a copy of any affidavit intended to be used in opposition. With respect, however, to the necessity for affidavits in support of or against a summons, it has been recently observed that it cannot be laid down as a general rule that a judge at chambers can act only upon affidavit; (*n*) and even a rule for a special jury, obtained in full Court, may by order of a judge be struck the next day; so as to secure to the plaintiff an opportunity of trying his cause, for otherwise the defendant might effectually delay the trial, and afterwards abandon such rule. (*n*) We have seen the general rules when or not the Court or a judge may act without affidavits. (*o*)

6. Form and substance of a judge's summons. (*p*)

The usual form of summons is subscribed. (*p*) The same particularity is not observed in the title of the cause in a summons as in the title of affidavits, and only the surnames of the parties

(*l*) *Semble*, see *Williams* v. *Roberts*, 1 Gale, 56; 1 Cr. M. & R. 676.

(*m*) *Semble*, that at least during the *vacations* a single judge may, by the terms of his summons, direct an *intermediate* stay of proceedings, when justice requires, as much so as the Court in banc, for otherwise the utmost injustice might ensue from the act 2 W. 4, c. 39, s. 11, allowing so many proceedings in vacation.

(*n*) *Joseph* v. *Perry*, 3 Dowl. 699.

(*o*) *Ante*, 535, 536.

Usual form of summons.

(*p*) See a form of summons to strike out a count, *post*; and see Tidd's Forms, 172, 221.

D. ats. B. } Let the plaintiff's [*or* "defendant's"] attorney or agent attend me at my chambers in Serjeants'-Inn to-morrow [*or* "on —— next,"] at —— of the clock in the forenoon [*or* "afternoon,"] [*in term time usually three o'clock in the afternoon, but in vacation at eleven o'clock in the morning*,] to show cause why, &c. [*here state the subject-matter or object of summons*, as "why he should not deliver to the defendant's attorney or agent an account in writing with dates of the particulars of the

are usually stated; and when a summons is obtained by a defendant, his name is usually first stated. In summons for particulars of the plaintiff's demand, and to plead several matters, or for time to plead, the words "and *why* in the mean time proceedings should not be stayed," (q) are usually inserted, and yet when the *Court* grant a rule nisi with a stay of proceedings, the rule may be drawn up with an *immediate* stay of proceedings, as thus: "In the mean time proceedings to be stayed;" (r) and it would be as well to omit the word *why* in a summons, so that in its very terms it may import an *immediate* stay of proceedings, for otherwise the summons itself would not operate as such stay until the instant of its being *returnable*. (s)

In a summons or motion to set aside proceedings for *irregularity*, and indeed in every other application, a party should not require relief beyond what he may be advised he is entitled to, especially in cases where it is expected the opponent will show that if too much had not been asked, the application would not have been resisted, in which case it frequently occurs that merely on account of the applicant having *asked too much* he is ordered to pay the costs, because by asking too much he compels the opponent to appear and show cause. (t) But on the other hand a party applying for a summons in respect of any supposed irregularity is bound at the earliest opportunity to bring forward and state at once *all* then existing objections, and will not be allowed to make successive applications unless upon grounds *subsequently* arising. (u) As regards an application on account of a defect in a writ, or a copy, or the service thereof, it has already been shown how the summons or rule nisi should be drawn up. (v)

7. Summons how far a stay of proceedings. (w)

In general a summons does not operate as any stay of proceedings until the time when it is *returnable*, and not from its

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plaintiff's demand, for which this action is brought," *or* "why the defendant should not have a month's time to plead," *and here specify any other terms desired to be imposed on the opponent.*] And in the mean time all proceedings in this action be stayed. Dated the —— day of ——, A.D. 1835.

[*The Judge's or Baron's signature.*]

(q) *Wells* v. *Secret*, 2 Dowl. 448.
(r) See form, Tidd's Forms, 180.
(s) *Post*, 559, 560.
(t) *Ante*, vol. iii. 237, 238, 275 to 279.
(u) *Greathead* v. *Bromley*, 7 T. R. 455; *Thornton* v. *Dumphy*, 1 Hen. Bla. 101; *Schumann* v. *Weatherhead*, 1 East, 537; *Wright* v. *Stevenson*, 5 Taunt. 850; *Thorpe* v. *Beer*, 1 Chitty's R. 124; Bagley's Ch. Pr. 26, 27.
(v) *Ante*, vol. iii. 237, 238, 275 to 279.
(w) See in general Bagley's Ch. Pr. 20, 21.

date or the time of the service; so that, notwithstanding the service, the opponent is at liberty at any time before the summons is returnable to sign judgment, or take any other step that he might have done in case the summons had not been obtained. (x) But from and after the time when a first summons is returnable it operates as a stay of proceedings until a judge has disposed of it. (y) And as the Court in banc may, upon granting a rule nisi ex parte, order an immediate stay of proceedings, it would seem that a judge also, especially in vacation, has similar power; as if a defendant hear of an irregular execution against his goods, and that the sheriff, at the instance of the plaintiff, is immediately about to sell in the afternoon of the day on which a summons is obtained, it cannot be doubted that a judge, on positive affidavit that an immediate sale or other injurious act is threatened to take place the same day, may grant a summons with an immediate order staying a sale and all other proceedings. (z)

But a summons on a *collateral matter*, as to tax an attorney's bill, or to discharge the defendant out of custody, it has been considered is no stay of the proceedings in a pending action; (a) and Lord Abinger observed: "The order, to have the effect contended for, should have *embodied in it* a stay of proceedings;" (a) nor is a summons any stay of proceedings unless duly followed up by obtaining and *drawing up and serving the judge's order*; (b) and yet it is a common doctrine that a summons is a stay of proceedings from the time it is returnable and until it has been disposed of. (c) Provided therefore a *first* summons, relating to the proceedings *in an action*, and not to a *mere collateral matter*, be returnable before the time to plead or the performance of some other act has expired, or before a judgment by default has been signed, it virtually stays or prevents the opponent from *afterwards* taking any step; because if he

(x) See in general as to when a summons is a stay of proceedings, Tidd, 470, 510, 511, 566; *Calse* v. *Lord Lyttleton*, 2 Black. 954; *Morris* v. *Hunt*, 2 Bar. & Ald. 355; 1 Chitty's R. 93, 97, S. C.; *Barnett* v. *Newton*, id. 689; *Rex* v. *Sheriff of Middlesex*, 5 Bar. & Ald. 746; *Glover* v. *Watmore*, 5 Bar. & Cres. 769; *Redford* v. *Edie*, 6 Taunt. 240; 1 Arch. K. B. 4 ed. 237; 2 *id.* 1008.

(y) *Wells* v. *Secret*, 2 Dowl. 447.

(z) *Semble*, and Tidd, 511.

(a) Tidd, 470; and though stated with doubt in 2 Arch. K. B. 1008, was confirmed in *Williams* v. *Roberts*, 1 Gale, R. 56; 1 Crom. M. & R. 676, S. C. However, as to an attorney's bill, 2 Geo. 2. c. 23, s. 23, enacts, "pending which reference and taxation no action shall be commenced or *prosecuted* touching the said demand," see Chitty's Col. Stat. 63, in notes, and see *Wells* v. *Secret*, 2 Dowl. 448, note (a); Tidd, 470.

(b) *Knowles* v. *Vallance*, 1 Gale, 16.

(c) *Morris* v. *Hunt*, 2 Bar. & Ald. 355; 1 Chitty's R. 93, S. C.; 5 Bar. & Ald. 746; *Glover* v. *Whatmore*, 5 Bar. & Cres. 769; *Redford* v. *Edie*, 6 Taunt. 240; Jervis's Rules, 29, note (t); Tidd, 470, 566.

had attended, as in due respect he ought to have done, at the return of the first summons, an order might have then been made, and it was his own fault that occasioned any extended delay. In a recent case it was held that as well a summons to plead several matters, as a summons for time to plead, returnable at eleven o'clock in the forenoon of the day after the time for pleading expired, was a stay of proceedings from and after that hour; so that a judgment signed at that hour when the judgment office opened, or afterwards, would be irregular. (*d*)

8. How many summonses are necessary, or when a summons must be attended, or an order will be made.

Formerly there must in general have been *three* summonses, and an affidavit of attendance thereon, (usually half an hour on each day,) before a judge could make an order on default of attendance; (*e*) but that troublesome, vexatious, dilatory, and expensive practice was altered by Reg. Gen. Trin. T. 1 W. 4, reg. 9, which ordered, "That hereafter it shall not be necessary to issue more than *two summonses* for attendance before "a judge upon the same matter, and the party taking out such "summonses shall be entitled to an order on the return of the "*second summons*, unless cause is shown to the contrary."

Only *two* summonses before an order now necessary.

In the case of a *prisoner* even *one summons* may suffice, it having been ordered by Reg. Gen. Hil. T. 2 W. 4, reg. 89, that "The order of a judge for the *discharge of a prisoner*, on "the ground of a plaintiff's neglect to declare or proceed to "trial or final judgment or execution in due time, may be "obtained at the return of *one summons served two days before* "*it is returnable*, such order in town causes being absolute, "and in country causes, unless cause shall be shown, within "four days, or within such further time as the judge shall "direct." (*g*)

In case of a prisoner *one summons for his discharge* suffices. (*f*)

In case of an *attorney's bill*, Reg. Gen. Hil. T. 2 W. 4, r. 91, directs that "An order to deliver or tax an attorney's bill may "be made at the return of *one summons*, the same having been "served two days before it is returnable;" and reg. 92 directs that "*One appointment* only shall be deemed necessary for "proceeding in the taxation of costs or of an attorney's bill." These rules have assimilated the practice of C. P. and Exchequer to that of K. B. (*i*)

One summons only necessary for delivery or taxing an attorney's bill. (*h*) And one appointment suffices.

The summons having been obtained, an accurate copy

9. Service of summons, and

(*d*) Per Parke, J., *Wells* v. *Secret*, 2 Dowl. 447.

(*e*) Tidd, 510, 511; Bagley, Ch. Pr. 22.

(*f*) Bagley, Ch. Pr. 21.

(*g*) See the former practice, Tidd, 368.

(*h*) Bagley, Ch. Pr. 21.

(*i*) Tidd, 335, 339, 680, 992; Jervis's Rules, 68, notes (*o*), (*p*); and see 4 T. R. 580.

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affidavit of such service. (k)

thereof should as soon as possible on the same day be made, and carefully examined with the original, and both should be taken to the opponent's attorney, and the copy either delivered to him personally or left for him (open and not inclosed in a sealed cover (l)) at his residence or office with his *clerk* or *servant before* nine o'clock in the evening, (m) but not on a mere laundress or other third person, unless sworn to be a clerk or servant of the principal attorney or agent. With analogy to rules, it would seem that if by mistake the original summons, instead of a copy, should be left, that would be immaterial. (n) Immediately after serving the copy, the person who served the same should indorse on the original the exact hour and place of service, and on whom made; indeed this is a precaution to be observed in serving every document and proceeding, so as to enable the party to swear with certainty to the particulars of the service. The party who obtained the summons should punctually attend at the judge's chambers at the appointed hour, and wait at least half an hour; and if the opponent do not attend, then a second summons should be obtained in the same terms as the first, and a copy thereof should be served in like manner; and the party who obtained the same should attend at the appointed time; and if the opponent do not attend at the hour appointed in the second summons, then, after half an hour has expired, there should be an affidavit made of the two summonses having been obtained, and of the service of both, and of the two attendances, for full half an hour each at the judge's chambers, and that the opponent did not attend; and upon reading such affidavit (the form of which is subscribed (o)) the judge will make his order. (p)

(k) See in general, as to the service, &c. Bagley's Ch. Pr. 18, 20.

(l) *Arrowsmith* v. *Ingle*, 3 Taunt. 234.

(m) Bagley's Ch. Pr. 19; Reg. Gen. Hil. T. 2 W. 4, r. 50, speaks only of the service of *Rules, Orders, and Notices*, but summonses are within the *principle* of the rule; and see *Freeman's Bail*, 2 Chitty's R. 88; Tidd, 261; *Arrowsmith* v. *Ingle*, 3 Taunt. 234; and see *Blackburn* v. *Peat*, 2 Crom. & M. 244; 2 Dowl. 293.

(n) *Leaf* v. *Jones*, 3 Dowl. 315.

Form of affidavit of service of two summonses, and of deponent's attendance, but that opponent has not attended.

(o) In the K. B. [*or* "C. P." *or* "Exch. of Pleas."]

Between { A. B., Plaintiff, and C. D., Defendant.

L. M., clerk to Mr. G. H. of ——, gentleman, attorney for the above-named defendant in this cause [*or* "plaintiff,"] maketh oath and saith that he, this deponent, did, on the —— day of —— instant, at about the hour of —— of the clock of the afternoon of the same day, *personally* serve Mr. E. F., who acts as the attorney [*or* "agent"] for the plaintiff in this cause, with a true copy of the first summons hereunto annexed and marked X. [or if served on a *clerk* or *servant*, then say, "did on, &c.

(p) 6 T. R. 402; Tidd, 649; I. C. P. 233, 676; Bagley, Ch. Prac. 18, 23, 26, 262, where the variations in form of affidavit are stated.

Copies of affidavits and notice of intention to attend by counsel to be given to opponent.

If the party obtaining a summons intend to use *affidavits*, he should hand copies to the opponent's attorney at the time the first summons is served, or as soon as practicable; (*q*) and if either party intend to attend by counsel, he should give the earliest practicable *notice* of that intention to the opponent, in order to enable him also, if he think fit, to obtain the assistance of counsel; for if either of these be omitted, the learned judge in attendance may postpone the hearing to prevent inconvenience by surprise, and enable the opponent to obtain affidavits in answer, or the assistance of counsel. (*r*)

10. *Place* of serving summonses, orders, and rules, and notices, &c. under particular circumstances.

To remove all pretence of difficulty in giving or serving *notice* of any proceeding or intended proceeding, and to prevent the necessity for travelling a great distance for the purpose, there are express rules in the Courts of K. B. (*s*) and *Exchequer*,(*t*) requiring *every attorney* admitted in those Courts and residing in London, or within ten miles, to enter in a book kept by the clerk of the pleas, or his deputy, in alphabetical order, his name and place of abode, or *some other proper place in* London, Westminster, or the Borough of Southwark (or in the Exchequer, within one mile of the office of the clerk of the pleas), where he may be served with *notices, summonses, orders, and rules*, in causes depending in that Court; and it is ordered that all notices, summonses, orders and rules, which do not require personal service, shall be deemed sufficiently served on

serve a true copy of the first summons hereunto annexed, marked X., on Mr. E. F., who acts as attorney [*or* " agent"] for the plaintiff in this cause, *by leaving* the same at the house [*or* " office"] of the said E. F. in ——, with his clerk [*or* " servant"] there,] and at the same time showed him the said original summons. And this deponent further saith, that he did at the same time leave with the said copy and with the said E. F. [*or* " the said clerk," *or* " servant,"] an examined copy of the affidavit made by the above defendant on his obtaining the said summons; and this deponent further saith, that on the —— day of —— instant, about the hour of ——, he did *personally* serve the said E. F. with a true copy of the *second* summons in this cause, a copy whereof is hereunto annexed marked Z., [*or state the service on a clerk or servant, as above,*] and at the same time showed him the said original second summons. And this deponent further saith, that he did duly attend the said several summonses, at the times therein respectively mentioned, at the chambers of the Hon. Mr. Justice ——, in Serjeants'-Inn Chancery-Lane, London, but that the plaintiff's [*or* " defendant's"] attorney or agent did not, nor did any other person on his behalf, attend the said summonses or either of them, at either of the said times, to the knowledge or belief of this deponent.

Sworn, &c. L. M.

(*q*) Bagley, Ch. Pr. 26.

(*r*) Two shillings are paid for each summons and for each order. The fee to counsel for attendance is in general three guineas; but in taxing costs the master only allows two guineas. The judge's clerk receives when counsel attend, 7*s*. 6*d*. See a bill of costs relating to a summons, *post*, " *Of striking out Counts.*"

(*s*) In the K. B. Reg. Hil. T. 8 G. 3; *In re Sandys*, 1 Dowl. 362; *Ward* v. *Nethercote*, 7 Taunt. 145; *Sealey* v. *Robertson*, 2 Dowl. 568.

(*t*) Reg. Mich. T. 1. W. 4, r. 8, Exchequer.

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such attorney, if a copy thereof be left at the place lastly entered in such book, with any person *resident* at or belonging to such place; and that if any such attorney shall neglect to make such entry, *then the fixing up of any notice*, or the copy of any summons, order or rule for such attorney in the said office, shall be effectual and sufficient. (*t*) And it has been held, that this rule extends to *pleadings*, as well as notices, summonses, &c.; (*u*) and that the rule is imperative on an attorney who resides out of London, Westminster, or Southwark, and above one mile from the office, to enter in the book not only his place of abode, but also therein to name some proper place within a mile from the public office where notices may be served for him. (*v*) If the attorney of either party has left his residence, and cannot be found, then endeavours must be made to discover where he is, and also to discover the residence of the party himself, or where he is, and the summons, order, rule, or other proceeding must be delivered to such party, or left at his residence, and all these endeavours must be sworn to particularly; and therefore it was lately decided, that the service of a rule by sticking it up in the office, will not be allowed upon an affidavit that the attorney's residence is unknown, unless it is also sworn that the party's residence is unknown. (*w*) Where a defendant has not caused his appearance to be entered, if his residence be unknown, then by leave of the Court not only may a copy of the declaration be stuck up in the office, but also a notice of inquiry may, by like leave, be stuck up there, and another copy left at his last place of residence. (*x*) And in almost all cases, (excepting attachments for contempt,) (*y*) the Court may dispense with personal service. (*z*) Consequently there can rarely be any excuse for the want of previous notice of any proceeding.

11. *Time* of day of serving a judge's summons, &c. &c.

The Reg. Gen. Hil. T. 2 W. 4, reg. 50, orders, "that service "of *rules and orders*, and *notices*, if made *before nine at night*, "shall be deemed good, *but not if made after that hour*;" which rule altered that of K. B. Mich. T. 41 Geo. 3, which allowed till ten o'clock at night, and renders the practice of that Court like that of C. P. and Exchequer, and nine o'clock

(*t*) Reg. Mich. T. 1 W. 4, r. 8, Exchequer; Jervis's Rules, 9, and decisions thereon; *Blackburne* v. *Peate*, 2 Cr. & M. 244; 2 Dowl. 293, S. C.

(*u*) *Blackburne* v. *Peate*, 2 Cr. & M. 244; 2 Dowl. 293, S. C.; and see Bagley's Ch. Pr. 19.

(*v*) *Supra*, note (*t*).

(*w*) *Wright* v. *Gardiner*, 3 Dowl. 657; and see *Mudie* v. *Newman*, 2 Dowl. 659.

(*x*) *Watson* v. *Delcroix*, 2 Cromp. & M. 425; 2 Dowl. 396, S. C.

(*y*) Not then, *Stunnell* v. *Tower*, 1 Cr. M. & Ros. 89; 2 Dowl. 673, S. C., overruling *Green* v. *Prosser*, 2 Dowl. 99.

(*z*) *Sealey* v. *Robertson*, 2 Dowl. 568.

is now the latest time in all the Courts. (*a*) And this rule extends to the service of a judge's summons. (*b*) And it would seem also to the delivery of pleadings, and probably every other proceeding in a cause, (*c*) though not to the service of a writ, or an arrest. (*d*)

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12. When not necessary to produce the original summons.

Reg. Gen. Hil. T. 2 W. 4, r. 51, ordered, "that it shall not "be necessary to the regular service of a *rule*, that the original "*rule* should be shown, unless sight thereof be demanded, "except in cases of attachment," which rule altered the previous practice of C. P., and rendered it similar to that in K. B. (*e*) It would seem that with analogy to that rule, it is not necessary, upon serving the copy of a summons, to produce the original summons, unless demanded, if even then. (*f*) It has been decided that a notice served on one of several defendants, who have suffered judgment by default, will be deemed equivalent to notice to each. (*g*)

13. Of indorsing a consent.

If the opponent's attorney consent to the terms of the summons he may do so generally, or give a qualified consent; in either case, the terms should be expressed in writing, and indorsed on the original summons, and signed. The original summons, with the indorsed consent, should then immediately be taken to the judge's chambers, and his clerk will prepare a proper order as by consent. And such order must be forthwith drawn up and served; for otherwise the opponent, notwithstanding his indorsed consent, may treat the summons as abandoned. (*h*)

14. Of attendance on the judge and his hearing the summons, and his *order* thereon.

Summonses waiting for hearing must be previously filed with the clerk of the judge who is in attendance, and they are usually called over successively, according to the numbers on the files, though summonses on which counsel attend are allowed to take precedence. (*i*)

Upon *attending the judge*, each practitioner or his counsel must be not only perfectly master of the facts and affidavits on each side, but even of the very line or exact part of each

(*a*) See Jervis's Rules, 55, note (*z*), and see Rule of Exch. Tr. T. 1 W. 4, r. 9, as *to all* proceedings.
(*b*) *Freeman's Bail*, 2 Chitt. 88; Tidd, 261; Bagley's Ch. Pr. 26; *ante*, 564.
(*c*) *Blackburn* v. *Peat*, 2 Crom. & M. 244; 2 Dowl. 293.
(*d*) *Ante*, vol. iii. 110, 111.
(*e*) Tidd, 500; *Wye* v. *Wright*, Barnes, 403; Jervis's Rules, 55, note (*a*).
(*f*) *Ante*, 562; *post*, 584.
(*g*) *Figgins* v. *Ward and others*, 2 Cr. & M. 424.
(*h*) *Joddrell* v. ——, 4 Taunt. 253; *Edenser* v. *Hoffman*, 2 Cr. & J. 140; *Charges* v. *Farhall*, 4 Bar. & Cres. 865; 4 Dowl. & R. 422; *post*, 568.
(*i*) Bagley, Ch. Pr. 24.

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affidavit where any material allegation is to be found, so as to be able instantly to point out such part; and the same may even be marked with pencil in the margin. Attempts to urge lengthy arguments would be injudicious, because, in consequence of the very numerous applications usually pressing for the immediate decision of the judge, there is time only to hear very concise observations, and if lengthy investigation be essential, the judge should be solicited to hear the case on a distinct occasion separately appointed. On the hearing of all or most summonses it would be well if principals or their most intelligent clerk would always attend the judge when the object of the application is opposed; it is well known that a celebrated practitioner who always attended summonses himself, on that account was more frequently successful than his opponent, who absurdly treated a summons as a subordinate branch of practice not demanding his personal attention, and even to be left to the conduct of an inexperienced clerk. We have seen that all known existing objections must be stated to the judge at the same hearing.(*k*)

15. Form and terms of *Order*, and of drawing up and serving the same.

An *Order* should be duly intituled in the cause, and if an order of reference reverse the surname for the Christian name of one of the parties, it will be a nullity, though it might be amended.(*l*) The usual form is subscribed.(*m*)

If an order be made, it must be *drawn up* and *served forthwith*, or the opponent may treat it as abondoned, and proceed as if it had not been made; (*n*) and a judge's order to change the plaintiff's attorney must regularly be served before any further proceeding, or the latter will be void.(*o*)

Order to be *peremptory*, and not merely *conditional*.

It is advisable, in general, to request that the judge's order may be drawn up as peremptory in its terms on each side as

(*k*) *Ante*, 559, note (*u*); *Thorpe* v. *Beer*, 1 Chitty's Rep. 124.

(*l*) *Price* v. *James*, 2 Dowl. 435; *ante*, vol. ii. 89, 90.

(*m*) The judge's clerk is entitled to two shillings for every order.

Form of a judge's order ex parte when the applicant only has attended.

A. B. agt. C. D. } Upon hearing the attorney or agent for the plaintiff, and on reading the affidavits of —— and ——, I do order that [*here state the subject-matter of the order.*] Dated this —— day of ——, 1835.

[Signature of the judge.]

The like, where both parties have attended.

A. B. agt. C. D. } Upon hearing the attornies or agents on both sides, [*or* " and by counsel,"] I do order that &c. [*state subject-matter of the order.*] Dated this · day of —— 1835.

[Signature of the judge.]

(*n*) *Charge* v. *Farhall*, 4 Bar. & Cres. 865.

(*o*) *Rex* v. *Sheriff of Middlesex*, 2 Dowl. 147.

may be consistent with justice.(p) And as a *conditional* order for leave to the plaintiff to amend upon payment of costs, &c. cannot readily be enforced by attachment, it seems advisable, when the party has in fact so agreed, to draw up the order as made upon the *undertaking* of the party to pay the costs,(q) and in terms *ordering* the payment thereof, as, "Upon hearing the plaintiff's attorney and the defendant's attorney, and the plaintiff *having undertaken to pay the costs,* I order that the plaintiff be at liberty to amend the, &c. after payment of such costs, and I do further, with the plaintiff's consent, order *that the plaintiff do pay the defendant's costs and the costs of this application,* and the costs occasioned by any such amendment, and that further proceedings shall be stayed until such costs be paid;"(r) for if there has been an irregularity, and the order be only *conditional* as to costs, and the plaintiff amend and proceed without paying the costs, the defendant's only course would then be to obtain a summons to rescind the order, and to set aside the plaintiff's proceeding on account of the previous irregularity.(r) From the same cases also it appears that, although the judge, upon giving leave to the plaintiff to amend, do order the payment of costs, and that proceedings be stayed till they have been paid, and he amend and proceed without paying the costs, yet no attachment can be obtained.

The jurisdiction of a judge, we have seen, is limited in some respects, though very extensive; he cannot, therefore, make an order for quashing a demurrer,(s) or, without consent, an order for the payment of a debt by monthly instalments.(t) We have seen that if a judge's order be obtained from his clerk by misrepresentation, it may be treated as a nullity, though the safer course would be to apply to the same judge, if time will admit, and obtain his discharge of such order.(u)

16. Judge's power to award costs.

We have seen that it is now settled that in most cases a judge at chambers has a *discretionary jurisdiction* over the costs of the application, and opposing the same, including those of affidavits, summonses, attendances, whether or not by coun-

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(p) See a form of a judge's peremptory order on a plaintiff to deliver up deeds on payment or tender of taxed costs, *Evans* v. *Millard*, 3 Dowl. 661.

(q) Such *undertaking* is essential in order to support a subsequent motion for an attachment for not paying on demand, *Harrison* v. *Wend*, 3 Dowl. 541; 1 Harr. & Wol. 212, S. C.

(r) *Turner* v. *Gill*, 3 Dowl. 30; *Rese* v. *Fenn*, 2 Dowl. 182; Bagley's Ch. Pr. 28, 30.

(s) *Foster* v. *Burton*, 3 Tyrw. 388.

(t) *Kirby* v. *Ellier*, 2 Crom. & M. 315; *ante*, vol. iii. 32.

(u) *Worsmann* v. *Pryee*, 3 Tyrw. 375.

sel, and of the fee to the judge's clerk.(*x*) In some cases, however, by express statute or rule, it is *imperative* on the judge to award costs, as in the instance of a summons to strike out a second count upon the same subject-matter.(*y*) In other cases, if nothing be said in the judge's order as to the costs, they will not in general be costs in the cause. (*z*) Consequently, a party who thinks that costs will be awarded to him should apply to the judge to allow them.

17. Order, how far conclusive until varied, rescinded, or set aside.

When upon a matter decided upon at chambers, a judge has entertained the question of costs, the Court will not afterwards hear a motion on the subject of such costs, they considering the judge perfectly competent entirely to dispose of and adjudicate upon that question. (*a*)

18. Judge's order, though imperative, may yet be abandoned.

An order, when imperative in its terms, and drawn up *and served*, is binding on all parties until it has been rescinded or set aside. (*b*) But a party may abandon a judge's order obtained by him, although it has been drawn up and served, when it is not imperative on him, but only gives him a *liberty* of which he may not afterwards think fit to avail himself; (*c*) and, therefore, where a plaintiff a few days before the assizes obtained a judge's order, giving him liberty to amend on the terms, that the defendant should have two days time to plead anew after such amendment, and the plaintiff afterwards delivered the issue without amending or rescinding the order, whereupon the defendant returned such issue as irregular, but the plaintiff proceeded to trial and obtained a verdict, his proceedings were holden regular. (*c*)

19. Of making a judge's order a rule of Court,(*d*) and enforcing the same.

In order to enforce a judge's order and obtain an attachment for disobedience, it must be made a rule of Court, and if the order be made in vacation, it cannot be made a rule of Court before the next term, nor then can it be made a rule as of the preceding term. (*e*) We have seen, however, that as respects

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(*x*) *Ante*, vol. iii. 28 to 32.
(*y*) *Ante*, 458.
(*z*) *Mummery* v. *Campbell*, 10 Bing. 511; 2 Dowl. 798, S. C. N. B. That was the case of an order by the *Court* to discharge a defendant on ground of coverture.
(*a*) *Davy* v. *Brown*, 1 Bing. N. C. 460; 1 Hodges, 22, S. C.
(*b*) *Wilson* v. *Hunt*, 1 Chitty's Rep. 647; and *James* v. *Kirke*, *id.* 246.
(*c*) *Black* v. *Sangster*, 3 Dowl. 206, the Court, however, on terms referred the cause to arbitration, and an award was in plaintiff's favour for a reduced sum.
(*d*) See in general, *ante*, vol. iii. 33; 7 Taunt. 43.
(*e*) *The King* v. *Price and another*, 2 Dowl. 233; 2 Cr. & M. 12, S. C.

the disobedience of a judge's order to return a writ in vacation, subsequent compliance, before the order has been made a rule of Court, will not exempt the sheriff from proceedings in the next term by attachment for the contempt previously incurred. (*f*) The proceedings by motion, and rule for an attachment, will be considered in the next section.

20. Of setting aside a judge's order. (*g*)

Although a judge's order may in *some* cases be set aside, if the Court, on motion, should think that the judge had no jurisdiction, or that he exercised it erroneously, yet as the mistake was an incident of all human tribunals for which neither party is to blame, (*h*) (excepting perhaps in erroneously pressing a decision in his favour which he ought not to have required;) (*i*) it follows that when the Court set it aside no costs are payable. (*k*) When there is any supposed ground for questioning the judge's decision, the application to the Court must be made promptly, and it is too late to apply to rescind a judge's order, allowing to the plaintiff's attorney the costs of taxing the costs on the back of a writ, of which more than a sixth part was taken off, after the order had been made a rule of Court, and an attachment obtained upon it, the Court observing, that the defendant has allowed the other side to go on and incur expenses, and he, therefore, was then too late. (*k*)

(*f*) *Ante*, vol. iii. 246, 247; and see *Rex* v. *Sheriff of Middlesex*, 2 Dowl. 437.

(*g*) See in general, *ante*, vol. iii. 32 to 35, *Rex* v. *Wilkes*, 4 Burr. 2569; *James* v. *Kirk*, 1 Chitty's Rep. 246: *Wood* v. *Plant*, 1 Taunt. 47.

(*h*) *Ante*, vol. iii. 34, 35; *Hargrave* v. *Holder*, 3 Dowl. 176.

(*i*) On this ground some learned persons have contended with great weight, that on principle a party who has occasioned expense to his opponent, which it turns out was improper or unfounded *in law*, ought [illegible] to be compelled to reimburse his opponent's expenses.

(*k*) *Thompson* v. *Carter*, 3 Dowl. 657.

CHAP. XVII. SECT. IV. OF MOTIONS AND RULES.

SECT. IV.—OF MOTIONS, RULES NISI, SHOWING CAUSE, RULES ABSOLUTE OR DISCHARGED, COSTS, ATTACHMENT, &c.

1. Notice of intended motion. (*l*)

We have considered the *expediency* and occasional necessity for a *notice*, as well of irregularity as of the intention to apply to the Court for relief. In the King's Bench, except in anticipation of motions for leave to file a criminal information against

(*l*) See *ante*.

a magistrate, or for a certiorari, a notice of motion is not in general necessary, although it seems *advisable* to serve the same, as probably more inclining the Court to allow costs. (*m*) In that Court it is not necessary even for the purpose of obtaining a stay of proceedings by the rule nisi, to serve any notice of motion as is required in C. P. and Exchequer. (*n*) In C. P. and Exchequer in general, unless two days' notice of motion be given, and affidavit of service thereof be filed, it is the practice not to draw up a rule nisi with an immediate stay of proceedings; (*o*) and Reg. Hil. T. 1 & 2 Geo. 4. (*p*) orders that when notice of motion is required to be given the filing "of "any affidavits in support of the application shall also be men-"tioned at the foot of the notice to enable the parties to obtain "a copy therefrom." But it is said that this direction is not strictly observed in practice. (*q*) It is advisable however to serve a notice in pursuance of the rule, and which may be in the subscribed form. (*r*)

Formerly in C. P. and Exchequer, but not in K. B. a notice of the intention to move for judgment as in case of a nonsuit was indispensable. (*s*) But now, by Reg. Gen. H. T. 2 W. 4. r. 68, "a rule nisi for judgment as in the case of a nonsuit may "be obtained on motion without previous notice, but in such "*case it shall not operate as a stay of proceedings.*" In respect, therefore, of this last qualification, it may still be advisable in all the Courts to give notice at least of this motion.

2. Brief to counsel, with copies of affidavits and documents, and with the *original affidavits* as sworn, and documents annexed.

A *brief* is to be prepared for counsel as instructions to move the Court for a rule. This should consist of *full copies* of the affidavits in support of the motion, including as well the title of

(*m*) *Ante*, 527 to 533.

(*n*) *Stratton* v. *Regan*, 2 Dowl. 585, overruling *Fortescue* v. *Jones*, *id.* 524; 2 Arch. K. B. 4 ed. 994.

(*o*) *Ante*, 532, 3; *Rolfe* v. *Brown*, 1 Hodges, 27; *Smith* v. *Wheeler*, 1 Gale, 16; 3 Dowl. 431, S. C.; *Warn* v. *Bickford*, 9 Price, 14; Tidd, 491; Dax, Prac. 137; Price, Prac. 290, 301.

(*p*) 9 Price, 88.

(*q*) Price, Prac. 306.

(*r*) In the Exchequer of Pleas.

Between { A. B. Plaintiff, and C. D. Defendant.

Take notice that this Honourable Court will be moved on —— next, or so soon after as counsel can be heard, for a rule to show cause why the writ of summons issued in this cause, and all proceedings thereon should not be set aside for irregularity with costs; and that in the mean time all further proceedings be stayed, and the grounds of irregularity are as follows [*here state them explicitly*, *ante*, 529, note (*h*).] Dated the — day of —— A.D. 1835. Yours, &c.

To Mr. E. F. G. H.

Attorney [*or* "Agent"] for the plaintiff. Attorney for the defendant.

In pursuance of Reg. Hil. 1 & 2 G. 4, you will further take notice that in support of the said application *the affidavits* of the said C. D., and of J. K. have been duly filed in the office of ——, and where you may obtain office copies of such affidavits.

(*s*) *Chessell* v. *Parkin*, 2 Taunt. 48; Dax, Pr. 79; Tidd, 491, 765.

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the Court and cause, as the body of the affidavits to the end, including also the jurat, and even the signature and copies of all documents referred to; *verbatim* copies of each will be found preferable to mere abstracts, and in general this is to be observed, even as regards mis-spelling. Then may properly follow a suggestion of the terms in which the rule nisi should be drawn up, with copies of any statute or rule of Court applicable to the motion, and extracts from reported cases when the motion is attended with the least difficulty. If the facts are numerous, it may be advisable to assist counsel with an analysis of dates and material facts, arranged in natural order in a column under each other, and then may follow an exact copy of any opinion previously given in favour of the application, with observations upon the whole. This should be delivered with the *original affidavits* to the counsel as early as possible before the day when he is requested to move for the rule, and such original affidavits must at least be handed to the counsel before he moves the Court, so that he may hand the same into the Court immediately after he has moved. Whenever the brief with private observations, if handed in, might by any possibility be read by the opponent in the office, as has sometimes occurred, then it may be prudent to make a distinct motion paper with the terms of the rule nisi marked thereon, and to request that the same may be handed into Court with the original affidavits, and the original brief with observations to be retained by the counsel.

3. Motion to what Court.

In general, a *motion* in any action must be made to the Court in which it is depending; and we have seen that if there be *several* actions depending at the same time in two Courts, it is then necessary to apply to each, although the ground of motion be precisely the same; because one Court will not assume any controul over the proceedings of another superior Court of co-extensive jurisdiction, (*t*) as where actions were depending in different Courts, and it became necessary to apply to both for relief under the interpleader act. (*u*)

If a motion be made to set aside a warrant of attorney which authorized a judgment in a particular Court, or if a judgment has been *regularly* signed in such Court, the motion should be to *that* Court, though if the judgment had been irregularly signed without authority in another Court, the *latter* might then set aside the judgment, though it could not order the warrant of attorney to be cancelled. (*x*)

(*t*) *Ante*, vol. ii. 349, 350.
(*u*) *Allen* v. *Gilby*, 3 Dowl. 143.
(*x*) *Ante*, vol. ii. 336; *Scurfield* v. *Gowland*, 6 East, 241, a.

The 4 & 5 W. 4. c. 62, s. 26, authorizes *motions* in an action depending in the Common Pleas at Lancaster to be made to either of the Courts at Westminster. (*y*)

With respect to *original motions* unconnected with and not made in the course of any pending action, we have seen that some are peculiar to each Court, and can only be made therein. (*z*)

4. Motion by whom to be moved.

In general, motions to be actually stated to the Court are to be made by a *counsel*, and in no case by a person acting as an *attorney* for another; and although in *civil* cases a party, when plaintiff or defendant, may *himself* move or address the Court without the intervention of an attorney or counsel, it is otherwise in all cases of a *criminal* nature, when no one but counsel can be heard; and a motion against an attorney, requiring him to answer matters contained in an affidavit, (*a*) or for an attachment against an attorney for alleged misconduct, must be made by a *barrister*, who, before he moves the Court, is supposed to have read and considered the affidavits, and to be of opinion that the application is proper, or at least not improper. (*b*) In one case, however, where, on the application of a private individual against an attorney, it appeared that the latter had been guilty of gross misconduct, and that the applicant required the *immediate* protection of the Court, the Court of its own accord directed that the affidavits should be answered. (*c*)

5. Time of moving.

With respect to the *time* of moving, the former rules and decisions on the subject will be found collected in the works referred to. (*d*) Motions of a *criminal nature*, as motions for a criminal information, or requiring an attorney to answer matters charged against him in affidavits, ought not to be moved *within the last four days* of term, because it is improper to keep a criminal charge against any person once promulgated in open Court suspended during vacation; (*e*) and it has recently been decided that a rule to show cause why an attorney should not answer the matters in an affidavit imputing misconduct cannot be moved on the last day of term. (*f*) But when, from the

(*y*) *Terus* v. *Fitzhugh*, 3 Dowl. 278; *Potter* v. *Mass*, 3 Dowl. 432.
(*z*) *Ante*, part iv., *per tot.*
(*a*) *Ex parte Pitt*, 2 Dowl. 439.
(*b*) *Ex parte Fenn*, 2 Dowl. 527.
(*c*) *Ex parte Pitt*, 2 Dowl. 439.
(*d*) As to days of moving and hearing rules Tidd, 9th ed. 497, 504; 2 Arch. K. B. 4th ed. 992 to 1007; Chitty's Summary Prac. 105 to 107, as to the *last* day of term.
(*e*) *Ex parte* ——, 2 Dowl. 227.
(*f*) *Re Turner*, 3 Dowl. 557.

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misconduct of one of the parties to an award, the submission cannot be made a rule of Court, so as to enable the opposite party to make it a rule of Court before the last day but one of the term after the award, the Court will on that day grant him a rule nisi, dated of that term, but to show cause in the next; (g) and the Court will not, on a motion made on the last day of a term for security for costs, on the ground that the plaintiff is abroad, permit it to be drawn up with a stay of proceedings; (h) and from the same and other authorities a rule nisi with a stay of proceedings will not in general be granted on the last day of term, though in cases where justice requires a speedy decision, the Court will sometimes grant a rule on the last day of term, and direct cause to be shown in a week or so at chambers. (i)

By Reg. Gen. Hil. T. 2 W. 4, r. 96, it was ordered "that *side-bar rules* may be obtained on the last as well as on other days in term," and which rule assimilated the practice of the King's Bench to that of the Common Pleas. (k)

6. Second motion on same ground, when or not permitted.

Further, as regards *time*, if a motion has been once made in respect of a *technical objection* to proceedings, and such motion has failed on account of a defect in the affidavit in its support, the Court will not in general permit a second motion on the same objection, although supported by an amended affidavit. (l) There is an ancient rule of Hil. T. 3 Jac. 1, A. D. 1605, (m) "That if any cause be once moved in Court in the presence "of counsel of both parties, and the Court shall thereupon "make an order, no person shall afterwards cause the same to "be moved contrary to such rule or order, under pain of an "attachment; and the counsel, knowingly making such motion, "shall not be heard here in any cause during the same term."

If an application, founded on a *technical objection*, has been discussed and discharged by the Court, though partly on account of the insufficiency of the affidavits, the party cannot in general apply again, though upon additional affidavits, because parties ought to come prepared with proper affidavits in the first instance. (n) A motion to set aside a bail-bond, on the ground of misnomer in the surname, will not be allowed to be

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(g) *Re Perring*, 3 Dowl. 98.
(h) *Gronow* v. *Pointer*, 3 Dowl. 571.
(i) *Ante*, vol. iii. 27; *Rowell* v. *Breedon*, 3 Dowl. 324.
(k) Tidd, 9th ed. 498; Jervis's Rules, 69, note (t).
(l) *Finch* v. *Cocker*, 2 Dowl. 383.
(m) Tidd, 531; 2 Arch. K. B. 4th ed. 999; and see *Kibblewhite* v. *Jeffreys*, 1 Chitty's R. 142.
(n) *Preedy* v. *Macfarlaine*, 3 Dowl. 460; 1 Gale, 20, S. C.

renewed, (o) nor any motion founded merely on a technical objection. (o)

But there are cases in which a party may make a second application to the Court on the same subject; and this, although he has not paid the costs of a former rule nisi, which had been discharged; (p) and where justice may require, and especially when a prior motion and discharged rule were founded on a new act or rule, and the party, or his counsel, or attorney, may have been misled, and failed for want of proper materials, (as an affidavit, when necessary,) the Court will sometimes reserve to the applicant, on refusing or discharging a rule, leave to him to move again on proper materials, but usually imposing proper terms; (p) as where the defendant had moved for a new trial before the under-sheriff, without founding his rule as required on an affidavit verifying the accuracy and identity of the under-sheriff's notes; in which case, although the Court discharged the prior rule, they gave the party leave to move again, on producing the proper materials. (q)

7. Conduct of counsel on moving for a rule nisi.

On moving the Court for a rule nisi in a new or difficult case, it is in general advisable to state the grounds and reasons against as well as for the application, and to endeavour to obtain the opinion of the Court or single judge in favour of the application, notwithstanding he is in full possession of all the difficulties and objections, because if he grant a rule nisi, notwithstanding the suggested difficulty, he will be better prepared and more disposed when cause is shown correctly to appreciate the arguments on each side, and consequently a favourable result will be more probable; and if the opinion of the judge should be strongly unfavourable in the first instance on moving for a rule nisi, it may not be expedient to incur the risk of drawing up the rule when reluctantly granted, and afterwards having the rule discharged, perhaps with costs, and still more because counsel, by uniformly adopting such explicit and honourable course, may justly acquire a general character for candour, of the utmost importance, not only to himself but his clients, when by concealment of an objection for the mere temporary advantage of obtaining a rule nisi, he would not only prejudice that character, but also when the judge hears the objection raised for the first time by the op-

(o) *Finch* v. *Cocker*, 2 Dowl. 383; and see *Warner* v. *Wood*, 3 Dowl. 262.
(p) *Wilton* v. *Chambers*, 1 Harr. 116; 3 Dowl. 333, S. C.
(q) *Johnson* v. *Wells*, 2 Crom. & M. 428.

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ponent, when showing cause, he perhaps might then give it more weight than if he had heard it together, with its appropriate answer in the first instance. (r)

8. When a rule is absolute in the first instance or only nisi. (s)

It is important for counsel, who have not had much experience, well to inform themselves upon the varying and somewhat complex practice relating to the question when or not a motion or rule is to be absolute in the first instance. (s) In general the officers of each Court are peculiarly well informed upon this branch of practice, and exceedingly obliging in the communication of their knowledge.

By the long established practice of the Courts, and by some express rules, many motions and rules granted thereon are absolute in the first instance, i. e. *instantly*, whilst others are only *nisi*, i. e. not to become absolute, *unless* on a certain day named in the rule cause be shown to the contrary by the opponent, (s) and the latter are differently framed. *Some* become absolute on the very day named, unless sufficient cause to the contrary be shown on that very day; and if the counsel do not on such exact day, show cause or arrange with the opponent's, counsel to bring the rule on for discussion on a subsequent day, the rule nisi will become absolute on that *very* day, and he cannot be heard to the contrary even on the next morning. (t) But more generally rules nisi require cause to be shown on a named day, in which case the opponent has the whole of that day, and therefore the rule cannot be made absolute until on or after the next day, and then or on some day afterwards counsel must move that it be absolute, or it would never be so. The opponent's counsel has, however, a *strict right* (though rarely exercised, and never without previous notice of the intention to do so,) to show cause on the *very day* named in the rule nisi, provided he has in reasonable time before shown his affidavits in answer to the counsel who is to support the rule. In general, the counsel who is to show cause against a rule nisi takes care to apprize the counsel in support of the rule that he is instructed to do so, and hands to him any affida-

When a rule may be moved absolute, or cause be shown.

(r) Perhaps exceptions might be allowed, if perchance it should *again occur* that a single judge will not hear any lengthy statement from counsel, on moving for a rule nisi, in which case it has been known that the mere suggestion of a difficulty, though clearly answerable, would induce the judge to refuse a rule nisi. There was a time when if motions were made before a certain single judge, rules nisi were frequently refused, but which the full Court in Banc afterwards granted. Hence it was then necessary to avoid any motion to that judge for any rule nisi, but application was made to the full Court.

(s) Tidd, 480, 485; 2 Chitty's Arch. K. B. 4th ed. 992 to 1008, where see the rules of each description enumerated, and see *post*.

(t) *Bagnall* v. *Shipham*, 1 Cromp. & J. 377; Jervis's Rules, 70, a.

vits intended to be used on showing cause; (*t*) after which it is usual to evince great courtesy between the respective counsel, each studying, as far as professional duty will permit, not to bring on the rule for discussion until it suits the convenience of each counsel, and still more that of the Court. But when a rule moved for in one term is drawn up to show cause in the next term, or is enlarged till the next term, it is then put into the *peremptory paper* in which all such rules are apportioned usually a certain number for each of the first five or six days in such next term, and regularly cause *must be shown on the very day*; and if inadvertently either side neglect by counsel then to appear and support or resist the rule, and in consequence it be disposed of, the Court will not, in favour of a mere technical objection, afterwards permit it to be opened and discussed, (*u*) though sometimes exceptions are allowed. (*x*)

The Reg. Gen. Hil. T. 2 W. 4, r. 102, directs that an order upon the lord of a manor to allow the usual limited inspection of the Court Rolls, on the application of a copyhold tenant, may be *absolute in the first* instance, upon an affidavit that the copyhold tenant has applied for and been refused inspection. But it has been decided that that rule only applies when an application has been made *in a cause depending*, and not to an *ex parte* application in other cases. (*y*) A rule for judgment against the casual ejector must be nisi, if not moved for until the second term after the service of the declaration in ejectment. (*z*) A rule for an attachment for nonpayment of costs, pursuant to the master's allocatur on a taxation between *attorney and client*, is only *nisi* in the first instance; but if the application be for an attachment for nonpayment of costs between *party and party*, then it may be absolute in the first instance. (*a*)

The Reg. Gen. Trin. T. 17 G. 3, in the King's Bench, as to attachments, prescribes when or not the rule shall be nisi or absolute in first instance. (*b*)

9. When costs allowed or refused, and when rule nisi is refused in *first instance*.

It has been the practice in C. P. (*c*) and the Exchequer, (*d*) and it seems also of K. B. (*e*) not to compel a party who moves

(*t*) *Ante*, 551, 552. It may be advisable for the *attorney* resisting a rule nisi to cause this to be carefully done on the day before that on which the rule can be moved absolute, for it frequently occurs that great difficulties arise in communications between the counsel themselves.

(*u*) *Warner* v. *Wood and another*, 3 Dowl. 262.

(*x*) *Semble*, see the same case.

(*y*) *Ex parte Best*, 3 Dowl. 38.

(*z*) *Doe* v. *Roe*, 1 Gale, 15.

(*a*) *Green* v. *Light*, 3 Dowl. 578, see *post*.

(*b*) *Post*, "Of Motions for *Attachments*."

(*c*) *Waldron* v. *Norris*, 2 Bla. R. 769; Tidd, 503.

(*d*) *Fitch* v. *Green*, 2 Dowl. 439.

(*e*) *Anonymous*, 2 Chitty's Rep. 241, where Bayley, J. expressed his regret that such was the practice.

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for a rule nisi which is refused, to pay costs to his opponent, who shows cause by counsel in the first instance, in consequence of a previous notice of motion; and hence it is not usual for practitioners in general to incur the expense of instructing counsel to oppose an application until after a rule nisi has been served.

10. Forms and requisites of rules nisi.

A rule nisi, and the copy thereof served, should be properly intituled or described in the margin in the cause with the *full Christian and surnames of all the plaintiffs and all the defendants*, and even the appearance of the opponent by counsel will not cure the omission. (*e*) The *names of the parties* should also be very accurately stated; and where a rule absolute had been drawn up, stating the names of the defendant (as Calver for Calvert) incorrectly, an attachment having been obtained, the Court set the latter aside with costs merely on account of such small error in a letter, and although the defendant had promised to pay the debt; (*f*) and it would seem that if in the title the Christian name be transposed, as "Mary Ann" instead of "Ann Mary," the irregularity would be fatal. (*g*) The usual forms of a rule nisi for setting aside proceedings for irregularity are subscribed, and may be readily applied to any case that may arise. (*h*)

(*e*) *Wood* v. *Critchfield*, 3 Tyr. 235.
(*f*) *Smith* v. *Calvert*, 2 Dowl. 276; *Wood* v. *Critchfield*, 3 Tyr. 235; and see *Poole* v. *Pembrey*, 3 Tyr. 387, that the transposition in the title of an affidavit annexed to a plea in abatement of the names forming the Christian name of one of the defendants, as "Mary Ann," for "Ann Mary," is fatal, so that the Court on motion set aside the plea."
(*g*) *Poole* v. *Pembrey*, 3 Tyr. 387.

Usual form of rule nisi for setting aside proceedings for *irregularity* in K. B. *or Exchequer*.

(*h*) In the King's Bench [*or* "Exchequer of Pleas."]
A. B. agst. C. D. — The —— day of ·   , 1835.
Upon reading the affidavit of G. H., it is ordered that the plaintiff, [*or* "defendant,"] upon notice of this rule to be given to him or his attorney, shall, upon ——, show cause why the [*here state the proceeding to be set aside*,] in this cause, and all further proceedings should not be set aside for irregularity, with costs to be taxed by the master; and that in the meantime all further proceedings be stayed. On the motion of Mr. ——.

By the Court.

The like in C. P.

In the Common Pleas.
A. B. agst. C. D. — The —— day of ——, A. D. ——.
Upon reading the affidavit of G. H., it is ordered that the plaintiff, [*or* "defendant,"] upon notice of this rule to be given to him or his attorney, shall show cause to this Court, on —— next, why the [*name of the proceeding to be set aside*] in this cause should not be set aside for irregularity; and why the plaintiff [*or* "defendant"] should not pay to the defendant [*or* "plaintiff," *or* "his attorney,"] his costs of and occasioned by this application to the Court, to be taxed by one of the prothonotaries of this Court; and in the meantime, and until this Court shall otherwise order, let all further proceedings in this cause be stayed.
On the motion of Serjt. —— for the defendant, [*or* "plaintiff."]

By the Court.

11. Statement in rule nisi of the *time* or *day* when the party is to show cause.

With respect to the statement in a rule nisi of the *day or time* when the opponent is to show cause, it varies according to the supposed time that will be *reasonably required* to obtain affidavits in answer to the rule, which must obviously depend on many circumstances, and principally the distance of the *opponent's residence* from town. In the *King's Bench* a rule nisi in a *town cause* usually requires the other party to show cause on the *fourth day*, exclusive of the day of obtaining the rule; but if the defendant reside or be in the *country*, not far off, then the *sixth* day, though if very distant, then the tenth day. (*i*) In the Common Pleas, and in all the Courts, towards the end of the term, in a *town cause*, the rule is frequently drawn up to show cause in *two days* inclusive, but if the affidavits be long, or the matter arose in the country, the rule is commonly drawn up to show cause in about a week. (*k*)

12. Rule nisi to be drawn up "on reading documents and affidavits, &c."

In drawing up rules nisi, if the application is in part founded on what appears in the *proceedings* or *pleadings* in the cause, or matters of record before the Court, the rule should state, that "upon reading the affidavit of —— and of ——, (*concisely* "*describing the documents*) the opponent is required to show "cause, &c.;" and in that case, but not otherwise, the Court may proceed on the *documents* without the affidavit, if defective. (*l*) And in the Court of K. B. (though it is otherwise in C. P.,) (*m*) a rule nisi to set aside an award must expressly state and describe all documents intended to be referred to on argument; and the rule must be drawn up "on reading the "affidavit of Y. Z., and a copy of the award of G. H., Esq." and not "on reading the *paper writing* hereunto annexed," although it be afterwards sworn that such writing was a copy of the award. (*n*) And the Court of K. B. refused to amend a rule defective in this respect, but permitted a fresh rule to be moved for. (*n*) So in the Exchequer a rule nisi for setting aside mesne process in proceedings to outlawry should be drawn up "on reading the original writ." (*o*) But in support of an application to the Court to set aside a judge's order, it suffices if the affidavit state the substance of the order, without setting it out verbatim or annexing a copy. (*p*)

13. The precise ground of objection to be precisely stated.

Great care must be observed in drawing up a rule (especially

(*i*) *Anonymous*, 2 Chitt. R. 372; Tidd, 499; 2 Arch. K.B. 4 ed. 994.
(*k*) Tidd, 499.
(*l*) *Howorth* v. *Hubersty*, 3 Dowl. 455; 1 Gale, 47; *Cliffe* v. *Prosser*, 2 Dowl. 21, 22.
(*m*) *Sherry* v. *Oakes*, 1 Harr. & Woll. 119; 3 Dowl. 349, S. C.; rule nisi amended in Exchequer, *Lewis* v. *Davison*, 3 Dowl. 272.
(*n*) *Sherry* v. *Oakes*, 1 Harr. & Woll. 119; 3 Dowl. 349, S. C.
(*o*) *Lewis* v. *Davison*, 3 Dowl. 272.
(*p*) *Sherley* v. *Jacobs*, 3 Dowl. 101.

in rules nisi to set aside any part of the proceedings for *irregularity*,) to state *the exact proceeding* objected to, or object to be prayed; (*q*) thus where the rule nisi was "to show cause why "the *service* of a writ should not be set aside for irregula- "rity," and it appeared on showing cause that there was no irregularity in the *time* or *manner* of *service* of the copy of the writ, but that the real objection was that the *copy served*, as well as the writ itself, were defective in not stating the date of the writ, the rule was discharged with costs, Bayley, B. observing, that had the motion been to set aside "the writ and service," or "the writ or service," the Court might have discharged the rule as to the service, and made it absolute as to the writ; but as no part of the rule was correct in its terms, it could not be sustained. (*r*) So where incorrectly a motion was made merely to set aside an *execution* on a warrant of attorney, the Court held that could not be, because the judgment and warrant of attorney were admitted to be good, and there was no separate objection to the execution itself. (*s*) And it seems advisable to state in the affidavit or rule nisi all the objections which it is proposed to rely upon. (*t*) It may frequently be advisable, when the affidavits in answer or the decision of the Court cannot certainly be anticipated, to draw up a rule nisi in the *alternative*, as to show cause "why a verdict for the plaintiff should "not be set aside and a nonsuit entered, *or* why the verdict "should not be reduced and entered for nominal damages "only." In such a case, if the plaintiff think that he cannot sustain the verdict *in toto, he should give notice accordingly*, for if he show cause generally, and the Court should order the verdict to be reduced as prayed, he will not be entitled to his costs of showing cause against the rule. (*u*) Every rule nisi, or the affidavit on which it is founded, when the *regularity* of the opponent's proceedings are objected to, must distinctly specify such objections, in order that the opponent may prepare to show cause. (*x*) And if a rule nisi be drawn up to set aside interlocutory judgment for *irregularity*, it cannot afterwards be made absolute or supported on a different ground, as that the judgment was signed against *good faith*, but the Court under the circumstance discharged the rule without costs. (*y*)

(*q*) *Ante*, vol. iii. 277, 278.

(*r*) *Hasker* v. *Jarmaine*, 3 Tyr, 381; 1 Dowl. 654, S. C.; Tidd, 9th ed. 161.

(*s*) Per Bayley, B. in 1 Dowl. 655, *supra*, i.e. no particular objection to the writ of execution itself being stated, an objection to the warrant of attorney or the judgment should have been stated, and the motion should have been to set *them*, or one of them, aside.

(*t*) *Supra*, 577, 580, and vol. iii. 277, 278, 279.

(*u*) *M'Andrew* v. *Adam*, 1 Bing. N. C. 270; 3 Dowl. 120, S. C.; *post*, 587, 588.

(*x*) *Aliven* v. *Furnival*, 2 Dowl. 49.

(*y*) *Smith* v. *Clarke*, 2 Dowl. 218.

14. All objections or grounds to be stated at once, and not successively.

Some rules nisi must embody a statement of all the objections intended to be relied upon when arguing in support of the rule. Thus, as regards *annuities*, Reg. Trin. T. 42 Geo. 3, of King's Bench, expressly orders, that "where a rule to show cause is "obtained for the purpose of setting aside an *annuity* the *several objections* thereto intended to be insisted upon by the "counsel, at the time of making the rule absolute, *must be* "*stated in the rule nisi*;"(z) and the same *practice* prevails in the other Courts.(z)

So, by *express rule* of King's Bench, "where a rule to show "cause is obtained to set aside *an award*, the several objections "thereto intended to be insisted upon at the time of making such "rule absolute must be stated in the rule to show cause;" (a) and the like practice prevails in the Court of Exchequer, (b) though in the Common Pleas the rules as drawn up do not state that they are made on reading the awards or other documentary evidence annexed. (c) And as well in King's Bench as in Exchequer the rule seems to extend as well to an *arbitrator's certificate* in lieu of an award as to a formal award, but each Court will, in case of a mistake, permit an amendment of the terms of the rule nisi. (d) It is therefore incumbent on the applicant's attorney as well as his counsel in these particular cases, to take great care that all the proposed objections be explicitly stated in the rule nisi before it is served. It seems also essential in all affidavits, motions, and rules nisi, for supposed irregularity, to bring forward and state to the Court and the opponent *all* the then existing objections, for, at least as respects a *summons*, we have seen that several *successive* applications will not be permitted, unless where a new ground of objection has arisen since the previous application. (e) On referring a rule to the master, if it be expected that his personal examination of a party, instead of receiving affidávits, will probably elicit the truth, the Court should be requested that it be part of the rule of reference to the master, that he be at liberty to receive viva voce testimony, without which he could only proceed on affidavits; but if the rule has not been so drawn up, the Court will not, after the master has made his report, alter the rule or refer it back to him. (*f*)

(z) See Rule, 2 East, 519; Tidd, 527.

(a) Reg. E. T. 2 Geo. 4, K. B.; 4 Bar. & Ald. 539; 2 Chitty's R. 376; and see Tidd, 845, for the decisions on this rule.

(b) As to Exchequer, Tidd, 844, 845; *Smith* v. *Briscoe*, 11 Price, 57; *Watkins* v. *Phillpots*, 1 M'Clel & Y. 394.

(c) *Whatley* v. *Morland*, 2 Dowl. 249; *Watkins* v. *Phillpots*, 1 M'Clel. & Y. 394; as to amendments of rules, 2 Arch. K. B. 4th edit. 959, 995.

(d) Per Patteson, J., in *Sherry* v. *Oakes*, 1 Harr. & Wol. 120.

(e) *Ante*, 559, note (u); *Smith* v. *Clarke*, 2 Dowl. 278; 2 Arch. K. B. 4th edit. 994, 998.

(*f*) *Noy* v. *Reynolds*, 1 Harr. & Wol. 14; 4 Nev. & Man. 483.

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15. Rule nisi to state to whom money to be paid, or deed, &c. delivered.

A rule nisi relating to the payment of money should in general require payment to the party entitled to the same, if in this country, or his agent named in the rule, or to his attorney in London, or in the country; so as afterwards, when the rule has been made absolute, to avoid difficulty in an authorized person making the proper demand without incurring the expense of a formal power of attorney.(*f*)

16. As to rule nisi praying costs.

When the party applying to the Court to set aside proceedings for *irregularity* or for any other purpose, is confident of success, he should by the express terms of his rule nisi *pray costs;* because the general rule is not to make a rule absolute with costs, unless they were prayed by the rule nisi; but if the result be doubtful, or if costs are a subordinate consideration, then it may be desirable, at least in rules nisi to set aside proceedings for *irregularity*, not to pray costs; (*g*) for if costs be prayed, and the rule be afterwards discharged, the party moving will then, by the *express rule* in King's Bench, Mich. T. 37 Geo. 3, have to pay costs as a matter of course.(*g*) On the other hand, if a rule be drawn up in the alternative, and the applicant fail on the substantial question, he will not be entitled to the costs of the rule, although he succeed upon one of the grounds, and his opponent will then have costs, if he duly gave notice that he only intended to resist the untenable part of the rule; (*h*) and certainly as a general rule, and as regards costs, it is better *to ask no more* by a rule than it is confidently expected the Court will decide the applicant is entitled to.(*h*) But the subject of *costs* will presently be more fully considered.(*i*)

17. Of a rule nisi directing an *immediate* stay of proceedings.

In the Exchequer, even under the first section of the interpleader act, 1 & 2 W. 4, c. 58, the Court will not, in granting a rule nisi, order an *immediate* stay of proceedings, unless notice of motion has been given; (*k*) but towards the end of a term the Court will sometimes, when justice requires, on that account direct the rule to be drawn up to show cause at chambers; (*k*) and we have seen that the Court of Common Pleas also refuse a stay of proceedings, unless notice of the applica-

(*f*) *Dennett* v. *Pass*, 3 Dowl. 632; and *post*.

(*g*) See express rule in K. B. Mich. T. 37 Geo. 3, *post*, "Costs;" *Cook* v. *Allen*, 3 Tyrw. 380; *Ryall* v. *Emmerson*, 2 Crom. & M. 468; *The King* v. *Sheriff of Middlesex*, 2 Dowl. 5, 6, where see the rule as stated by Bayley, B., in *Tilley* v. *Henly*, 1 Chitty's Rep. 136.

(*h*) *M'Andrew* v. *Adam*, 1 Harr. & Wol. 270; 3 Dowl. 120, S. C.; see further as to costs in this case, *post*, 597.

(*i*) *Post*, 597 to 608.

(*k*) Per Parke, B., in *Smith* v. *Wheeler*, 1 Gale, 15, 16; 3 Dowl. 431; Jervis's Rules, 55, note (*a*).

tion has been given; (*l*) but that in King's Bench the settled practice is without any notice of motion to grant a rule nisi with an immediate stay of proceedings. (*m*) In this case the rule nisi should not be drawn up requiring the opponent to *show cause* why all proceedings should not be stayed, but conclude peremptorily with an instant order of the Court that the proceedings be stayed, as thus, "In the mean time all proceedings are to be stayed." (*n*)

18. Amendments of rules nisi, when allowed, or when a fresh rule must or may be obtained.

We have seen that in the King's Bench, if a rule nisi in support of a *technical* objection be defective, the Court will not permit an amendment, but when justice requires the Court will enlarge the rule, and give time to move for a fresh rule; (*o*) and in the Exchequer a rule nisi for setting aside proceedings in outlawry may be enlarged, amended, and again served. (*p*) It is laid down, however, as the general practice, that if a rule or order of the Court be drawn up wrong by mistake in the office, the Court, upon application, will order it to be corrected; (*q*) and recently, where the Christian and surname were transposed by mistake in an order of reference, the Court allowed an amendment. (*r*)

19. Of service of a copy of the rule nisi and affidavit of such service. (*s*)

The rule nisi having been obtained, a very *accurate copy* thereof, and of all annexations, if any, must be made and *served* on the party against whom the rule has been obtained, and if the copy served be not intituled, or be inaccurately so, as not exactly in the full Christian and surnames of all the plaintiffs and defendants in the cause, then even the appearance of the party served by counsel will not, it has been considered, aid the omission. (*t*) It is expressly ordered by Reg. Gen. Hil. T. 2 W. 4, reg. 51, "that it shall not be necessary to the regular "service of a rule that the original rule should be shown, unless "sight thereof be demanded, except in cases of attachment," which rule similates the practice of Common Pleas to that of

(*l*) *Rolfe* v. *Brown*, 1 Hodges's Rep. 27; *ante*, 531, 570, 571.
(*m*) *Ante*, 571.
(*n*) See forms, *ante*, 578.
(*o*) *Ante*, 574, 575; *Sherry* v. *Oakes*, 1 Harr. & Woll. 119; 3 Dowl. 349, S. C.; as to amendments of a rule of reference to arbitration, *Evans* v. *Senor*, 5 Taunt. 662; *Grimstone* v. *Bell*, 4 Taunt. 254; *Dartnall* v. *Howard*, 2 Chitty's Rep. 29; *Rawtree* v. *King*, 5 Moore, 167; *Rex* v. *Bingham*, 1 Crom. & J. 245; *Price* v. *James*, 2 Dowl. 435.
(*p*) *Lewis* v. *Davison*, 3 Dowl. 272.
(*q*) Tidd, 9th edit. 506; *Lopes* v. *De Tastet*, 8 Taunt. 712.
(*r*) *Price* v. *James*, 2 Dowl. 435.
(*s*) See in general as to *service* of rules, *ante*, Tidd, 500; 2 Arch. K. B. 4th edit. 995.
(*t*) *Wood* v. *Critchfield*, 1 Crom. & M. 72; 3 Tyrw. R. 235; 1 Dowl. 587; *Smith* v. *Calvert*, 2 Dowl. 276; *Clothier* v. *Ess*, 3 M. & Scott, 216; 2 Dowl. 731, S. C.

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King's Bench. (*u*) It is, however, always advisable to produce and tender the original to the party for inspection, and to *deliver* to him the copy at the same time; a mistaken delivery of the original rule instead of the copy has, however, been deemed sufficient service. (*x*) We have seen that by express rules in King's Bench and Exchequer an attorney residing out of London, and within ten miles, must appoint a place of service within a mile, where he may be served with rules, &c. (*y*) And the cases when a rule may be served by sticking it up in the office have also been stated. (*z*)

20. When service of rule nisi need not be personal.

In general a rule nisi may be served either *personally* on the party called upon to show cause any where, or on his *wife* or *servant* at his residence; and unless inspection of the original be demanded, it need not be produced, except in cases of attachment; (*a*) and service of a rule nisi on one of several joint defendants, who had previously suffered judgment by default, and thereby admitted joint liability, suffices; (*b*) and the Court of King's Bench granted a rule nisi to compute principal and interest on a bill of exchange, to be served on the porter of the Junior United Service Club, on an affidavit that the bill had been accepted payable there, and that deponent believed defendant was a member of such club, &c. (*c*) But when the service is on a *third* person, the connection as wife or servant of the party must be shown; and an affidavit of service on a laundress or person at the house or chambers of the party, without swearing that he or she was then the *servant* or *inmate* of such party, will not suffice. (*d*) And service on the landlady of a defendant, not being his servant or his inmate, is insufficient; (*e*) and the service of a rule nisi to compute, by putting it under the door of the defendant's chambers, is not sufficient, although the laundress stated that the defendant would probably have the rule in the course of the day, the Court saying, " Putting " the rule under the door is not of itself sufficient. It does " not appear here that the deponent might not have gone to " the chambers another time and found them open." (*f*) Al-

(*u*) Jervis's Rules, 55, (*a*); and see *Holmes* v. *Senior*, 7 Bing. 162.
(*x*) *Leaf* v. *Jones*, 3 Dowl. 315.
(*y*) *Ante*, 563, 564.
(*z*) *Ante*, 564.
(*a*) Tidd, 9th ed. 500; *Hall* v. *Franklin*, 2 Price's Rep. 4; and see Reg. Gen. Hil. T. 4 W. 4, reg. 51, *ante*, 583.
(*b*) *Figgins* v. *Ward*, 2 Cr. & M. 424.
(*c*) *Ridgway* v. *Baynton*, 2 Dowl. 183.
(*d*) *Alunson* v. *Walker*, 3 Dowl. 258; *Stratton* v. *Hawkes*, 3 Dowl. 25; *Warren* v. *Smith*, 2 Dowl. 216; *Smith* v. *Spurr*, 2 Dowl. 231; *Kent* v. *Jones*, 3 Dowl. 210.
(*e*) *Gardner* v. *Green*, 3 Dowl. 343.
(*f*) *Stratton* v. *Hawkes*, 3 Dowl. 25.

though the defendant himself may have gone away, yet if his family remain living at his house, the leaving a rule nisi there for him with his wife, servant or inmate, is a sufficient service, without any previous leave of the Court. (*g*) And where a party is already in contempt, it is not necessary that a rule calling upon him to answer it should be personally served. (*h*)

21. When the service *must* be *personal.*

It has, however, long been considered an established rule that, *to bring a party into contempt*, a copy of the rule must be *personally* served upon him, even though he be an attorney, and also that the original rule, being the very act of the Court, be at the same time shown to him; (*i*) and in cases of *attachment*, Reg. Gen. Hil. T. 2 W. 4, reg. 51, we have just seen impliedly requires production of the original rule, although not demanded; (*k*) and many years ago the Court of King's Bench refused to grant a rule to dispense with personal service of the master's allocatur for costs, with a view to an attachment on an affidavit that the defendant kept out of the way to avoid being served; (*l*) and although there has been a recent decision to the contrary, (*m*) yet in one of the latest reported cases on the subject the Court held that that decision was erroneous, and that personal service could not be dispensed with. (*n*) And to ground a motion for a contempt in disobeying a rule of Court, it is not only necessary to produce and show to the party the original rule, but also to deliver him an exact copy of such rule, (*o*) although the delivery to the party of the *original rule* by mistake, instead of a copy, was holden sufficient service. (*p*)

If the attorney or party has left his residence, and it is not known where he is gone, then upon an affidavit, showing sufficient exertion to discover where he is gone, but not otherwise, the leaving a copy of the rule nisi at the last place of abode, and sticking up another copy in the office, may suffice, except in cases of attachment. (*q*)

(*g*) *Payett* v. *Hill*, 2 Dowl. 688.
(*h*) *Levy* v. *Duncombe*, 1 Gale, 60.
(*i*) Tidd, 500; *R.* v. *Smithico*, 3 T. R. 351; *Reid* v. *Deer*, 7 Dowl. & Ry. 612; *Parker* v. *Burgess*, 3 Nev. & Man. 36; *Woollison* v. *Hodgson*, 3 Dowl. 178; *Stanwell* v. *Towers*, 1 Cr. M. & Rosc. 88, overruling *Green* v. *Prosser*, 2 Dowl. 99; and *Allier* v. *Newon*, *id.* 582.
(*k*) *Ante*, 583; *Holmes* v. *Senior*, 7 Bing. 162.
(*l*) *Anonymous*, 1 Chitty's Rep. 503; *In the matter of* ——, *Gent.* 1 Dowl. & Ry. 529.
(*m*) *Green* v. *Prosser*, 2 Dowl. 99; and see *Weston* v. *Faulkner*, 2 Price's Rep. 2; *R.* v. *Fowey*, 5 Dowl. & Ry. 614.
(*n*) *Woollison* v. *Hodgson*, 3 Dowl. 178; 1 Crom. M. & R. 89, expressly overruling *Green* v. *Prosser*, 2 Dowl. 99.
(*o*) *Parkin* v. *Burgess*, 3 Nev. & Man. 36.
(*p*) *Leaf* v. *Jones*, 3 Dowl. 315.
(*q*) *Mudie* v. *Newman*, 2 Dowl. 639.

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22. The *time* of serving the rule nisi.

As soon as practicable after the Court have granted a rule nisi, it should be drawn up by the proper officer, who will oblige by expedition when necessary, as when a sale under an execution is apprehended; and a copy should be made and carefully examined, and served upon the opponent's attorney, and all other persons who may be about to proceed, especially when the rule by its terms is to operate as a stay of proceedings; and in all cases if the service be delayed so long as not to leave sufficient time to obtain office copies of the affidavits, and prepare others in answer, and to instruct counsel to show cause before the appointed day, the Court will as of course enlarge the rule however urgent the object of the application may be. And a service at a great distance from London of a rule nisi on the very day when the party was thereby required to show cause, is much too late, and the rule must be enlarged, and the enlarged rule served again. (*r*) Indeed, if the rule be not served in a reasonable time for these purposes, the party who obtained the same would not, on his affidavit, which must show the time and place of service, be allowed to move the rule absolute, but must himself apply to enlarge the rule, and as soon as possible must serve such enlarged rule, and not attempt to move to make the same absolute until a reasonable time has elapsed after such service of the enlarged rule. The service of a rule nisi even to compute (which is considered much of course), at York, on the very day cause was by the terms of such rule to be shown, was holden insufficient to move absolute upon, although ten days had elapsed since the actual service on that day. (*s*) And no rule can be served on a Sunday, (*t*) nor between 10th August and 24th October, (*u*) nor after nine o'clock at night in either of the Courts. (*x*)

23. Of enlarging and reviving rules. (*y*)

By the long established practice of the King's Bench, a rule might be *enlarged* by the counsel for the opponent applying to the Court for that purpose, sometimes on a mere suggestion of time being required, and without affidavit or notice of the application, and even in the absence of the applicant's counsel. But in the Common Pleas notice of the intention to apply to enlarge the rule was always required. (*z*) Now Reg. Gen. Hil. T. 2 W. 4, reg. 97, orders that "*a rule may be enlarged*

(*r*) *Farrell* v. *Dale*, 2 Dowl. 15.
(*s*) *Id.*
(*t*) *M'Ilrham* v. *Smith*, 8 T. R. 86.
(*u*) *Ante*, vol. iii. 100.
(*x*) Reg. Gen. Hil. T. 2 W. 4, r. 50, see the rule, *ante*, vol. iii. 100; Jervis's Rules, 55, note.
(*y*) See in general, *ante*, vol. iii. 99.
(*z*) Tidd, 484, 498, 502, 503, *semble*, for the reasons stated in the context, the former practice of the Common Pleas was in some respects more convenient than the present.

if the Court think fit without notice," (*a*) so that now the practice in all the Courts is similar to the former practice in the King's Bench. It has, however, been objected that this enables a party opposing a rule, even without any affidavit of just cause, to enlarge it in the absence of the party who obtained the rule, and without affording him an opportunity of resisting such enlargement, and which frequently may be attended with inconvenience, if not injury; for the counsel instructed to make the rule absolute sometimes does so, not being aware of the enlargement, or he uselessly prepares to do so; and in rules nisi for relief, prejudicial delay sometimes ensues, and it is therefore contended that the former practice in the Common Pleas was preferable. It was not the practice formerly to *serve enlarged rules*, because both parties being by their counsel before the Court when the enlargement took place were sufficiently apprized thereof; (*b*) but now as the enlargement may take place in the absence of the opponent, it would seem that he ought to have a copy of the enlargement forthwith served upon him.

If a rule be drawn up to show cause in one term, it ought regularly to be disposed of in that term, or the party who obtained the rule should take care to move the Court *to enlarge* the rule until the next term, and so on from term to term. (*c*) But if he omit to do so, although he cannot otherwise move to make it absolute in the following term, yet he may in general then move upon the former affidavit and materials to *revive* his rule and call on the opponent to show cause in that term. (*d*)

A rule may be *revived* if it has not been enlarged or made absolute in due time; (*e*) and although it is too late on the last day but one of a term to move to make absolute a rule nisi which had been drawn up to show cause in the previous term, yet on such last day but one of the second term a rule may be obtained to show cause on the first day of the third term, provided such rule be served before nine o'clock on such last day but one of the second term. (*f*)

24. Notices to be given by a party against whom a rule

If a party has been served with, or had intimation of a motion or a rule, which he resolves *not even in part* to resist, he should, to prevent an increase of costs by any further pro-

(*a*) See Jervis's Rules, 69, note (*a*).
(*b*) Tidd, 500, cites 1 Smith's R. 199.
(*c*) See in general as to enlarging and reviving a rule, *ante*, part v. vol. iii. 99.
(*d*) *Smith Collier*, 3 Dowl. 100; 9 Legal Obs. 236; *ante*, vol. iii. 99.
(*e*) *Id. ibid.*; Tidd, 502.
(*f*) *Smith* v. *Collier*, 3 Dowl. 100; 9 Legal Ob. 236.

has been obtained of his intention not to resist the same, or to resist only in part.

ceedings, serve a *written notice* on the attorney who has obtained the rule, that he consents to the application, and will pay any costs that may be payable on receiving a bill; and he should also do the act required, and tender the probable amount of costs; after which, if the attorney who obtained the rule should take no notice of the application, and instruct counsel to make the rule absolute, the party to oppose the rule should make an affidavit of the offer, and instruct counsel merely to resist the payment of costs, and to pray costs of showing cause.(*g*) But the party guilty of the irregularity must take care not to propose any unreasonable terms; for if he do, the opponent may proceed to make his rule absolute with costs.(*h*) As where a defendant, having been arrested on a defective affidavit, obtained a rule nisi for cancelling the bail bond, whereupon the plaintiff's attorney, properly to save expense, offered to consent to a judge's order to the same effect as in the rule, except as to the costs of the rule, which he insisted should be costs *in the cause,* which being rejected, the rule was moved absolute, and the plaintiff's counsel urged that after such offer the defendant ought not to have the costs of moving absolute; but the Court said, "If you had offered to pay the costs of the rule nisi, *that would have been so;* but as that was not the case, the rule must be absolute with costs."(*h*) If a rule nisi prays too much, or in the alternative, and the party to show cause assents to the rule being in part absolute, but resists the residue, then he should serve a distinct written notice accordingly, in which case, if the party persist in endeavouring to make the whole rule absolute, but fail as to that part properly resisted by the opponent, then he may have to pay the costs sustained by that party in showing cause to such part, or at least so much of the costs would be costs in the cause.(*i*) If a party show cause against an entire rule, and the rule nisi be made in part absolute, then, although the party showing cause do so with effect as to a part, yet unless he has given notice as above, he will not be allowed any costs.(*k*)

25. What party to show cause.

A party upon whom a rule does not expressly call to show cause is not, because he has been served with a copy of such

(*g*) *Ante,* 534, 580; *Clarke* v. *Crockford,* 3 Dowl. 693.

(*h*) *Clarke* v. *Crockford,* 3 Dowl. 693; *ante,* 534.

(*i*) *Per* Tindal, C. J., in *M'Andrew* v. *Adams,* 1 Bing. N. C. 270; 3 Dowl. 122; and see *Clarke* v. *Crockford,* 3 Dowl. 693.

(*k*) *Id. ibid.*; but see *Rough* v. *Thompson,* cited in 3 Dowl. 122.

rule, obliged to appear and show cause; and if he do, the Court will not give him his costs of appearing; (*l*) for he ought to rest satisfied that the Court will not make a rule absolute against him unless he has been expressly made a party in the rule nisi. (*l*)

26. Of showing cause against a motion in first instance, or against a rule nisi.

Unless in cases where a defendant has given notice of motion, in order to obtain a stay of proceedings, or in cases where a stay of proceedings would be seriously injurious to a plaintiff, it seems not to be expedient for him to show cause by counsel in the first instance; because the costs of showing cause in the first instance are not in general allowed, although a rule be refused. (*m*)

27. Of obtaining *office copy* of the *rule* nisi, and of the *affidavits* in support of rule before showing cause.

Before showing cause, it is said that the opponent must obtain an *office* copy of the rule nisi, (*n*) and also of the affidavits filed in support of the rule, and that otherwise counsel cannot be heard; (*n*) but as the opponent must have been served with a copy of the rule nisi, the ground on which it is supposed he must obtain an office copy of such rule seems to have been always questionable; and, probably, as we have seen that the practice of requiring *office copies of the affidavits* in support of a rule has of late not been adhered to, (*o*) so also the necessity for obtaining an office copy of the *rule* may now be questionable. One useful object in requiring official copies might be to secure accuracy of the documents to be produced on the discussion; but probably the real motive was the payment of fees to the officers who made the copies.

28. Of swearing affidavits in opposition, and showing the same to the counsel in support of the rule.

We have in a prior page (*p*) considered the requisites of and time of swearing affidavits in opposition to a motion or rule nisi. (*p*) These having been obtained are not, excepting in the case of affidavits after a rule has been enlarged until a following term, in general filed in the office until the rule has been argued and disposed of; but the counsel who is to show cause keeps them until a reasonable time before the rule is

(*l*) *Johnson* v. *Marriott*, 2 Crom. & M. 183; 2 Dowl. 343, S. C. See the same principle in *Howorth* v. *Habbersty*, 3 Dowl. 457.

(*m*) *Ante*, 557; 2 Chitty's R. 241; *Fitch* v. *Green*, 2 Dowl. 439; *Grove* v. *Parker*, *id.* 628; *Begbie* v. *Grenville*, 3 Dowl. 504, *sed quære* the *principle* of the practice of refusing costs in such a case.

(*n*) Tidd, 9th edit. 501.

(*o*) *Ante*, 551, 555; *Foy* v. *Pitt*, K. B. Hil. T. 1835, 9 Legal Obs. 269; where the Court, after consulting the clerk of the rules, thought that as according to the modern practice it had not in all cases been held necessary to take such copies, it could not be required in that instance.

(*p*) *Ante*, 553.

argued, when he usually delivers such affidavits to the counsel in support of the rule. If the affidavits are lengthy, it is proper in courtesy that the counsel showing cause should authorize the former to have *a copy promptly* made for his private use, taking care to have back the original before the time of argument.

29. Brief to counsel to move that rule nisi be *absolute.*

Considerable care, attention, and skill, may be essential in preparing the briefs for or against a rule nisi when the affidavits are lengthy, or the points to be discussed are new or intricate.

In *support* of the rule the *original* brief with its annexations should always be delivered to the counsel, whose own notes thereon may refresh his memory; and such brief will, if framed as before recommended, contain exact copies, and not mere abstracts of the affidavits and documents filed, and reference to authorities in support of the rule. Next should be delivered to the same counsel a brief, or instructions to move to make the rule absolute, with a left-hand margin throughout for such counsel's annotations. To this should be so annexed as to be readily detached, the original rule nisi and the original affidavit of service of a copy thereof; so that should any question arise as to the terms of the original rule or of the affidavit of service, the counsel may be able instantly to hand the same to the Court or one of its officers to be read. The private brief absolute will then contain, *first*, a copy of the rule nisi; *secondly*, a *copy* (not a mere abstract) of the affidavit of service; *thirdly*, very accurate and carefully examined copies of all the affidavits and documents in support of the rule nisi; for it frequently has occurred that great confusion arises from want of due care in such copies; *fourthly*, a copy of any authorities or observations referred to in the original brief; *fifthly*, a statement of any observations made by the judge or judges on granting the rule nisi; *sixthly*, a statement of any subsequent circumstances, as any enlargement of the rule nisi, &c. and at whose instance, and a copy of any enlarged rule; and, *seventhly*, if the opponent has, as sometimes laudably occurs, delivered to the applicant's attorney copies of his affidavits to be used on showing cause, then the same copies of such affidavits should be given with short observations in the margin on any particular parts; *eighthly*, there may be more particular observations on each affidavit, and extracts from or reference to any statute, rule of Court, or decision for or against the rule being made absolute; and *ninthly*, observations as to the

costs to be prayed for or resisted by either party; and *tenthly*, a concise chronological analysis of dates and important events in column will frequently materially assist the counsel.

But it is to be regretted that too often there is not sufficient facility afforded by practitioners in furnishing, or permitting to be taken, copies of the affidavits in opposition. In general the counsel who has to oppose a rule should hand over his affidavits, and not object to the counsel in support of the rule having a copy thereof promptly made, so as to enable him with more facility to comment on such affidavits; and it is prudent for every attorney who has to support a rule, in the morning of the day before the rule, according to its terms, might be discussed, i. e. on the morning of the day named in the rule, to attend the Court, and ascertain from his counsel whether he has obtained any affidavits that he may have copied, and immediately have them copied; and such copy with the original should be delivered to his counsel as early as possible the *same evening*, together also with the above suggested observations on the terms of such affidavits. Without having such copies, it will occur in the multiplicity and hurry of business, especially towards the end of a term, that a counsel having to support a rule, and having had a very cursory perusal of the affidavits in answer, which he has been obliged to return, will have great difficulty in recollecting dates and precise circumstances, which if he have copies before him he can obviously state readily and with confidence of accuracy.

30. Brief to oppose Rule.

The *brief* or instructions to *oppose* a rule nisi should, for greater security and in avoidance of all possible objections, have annexed, in a manner readily to be detached, an office copy of the rule nisi, and also office copies of the affidavits in support of the rule, though we have seen that these are not perhaps strictly necessary. (q) The *original* affidavits in opposition should accompany the brief. The *private brief* should first contain a copy of the rule nisi; secondly, full and very exact copies of all affidavits and documents filed in support of the rule; *thirdly*, a copy of any enlarged rule; *fourthly*, a copy of all affidavits in opposition; *fifthly*, observations on the affidavits; *sixthly*, a chronological compact analysis of the dates and most material points sworn to be the same as in the brief to support the rule; and *seventhly*, references to the statutes, rules, and decisions applicable to the particular case.

(q) *Ante*, 589.

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31. When or at what time a rule nisi should be *moved* absolute.

We have in a prior page stated some cases when a rule is only nisi, or when it becomes absolute of itself, unless cause be shown, and when a rule continues open until counsel has moved to make it absolute or discharge it. (*q*)

The distinction in the Exchequer is between some rules (then *improperly* called nisi) (*r*) which became absolute on a certain day, *unless* cause be shown on that day, (as is the form of a rule in the Exchequer for costs of the day,) and a rule strictly *nisi*, and in form requiring cause to be shown on a certain day, in which case the *day after* that mentioned in the rule is the day for showing cause. (*s*) In the former case, at least in the case of a rule nisi for costs of the day for not proceeding to trial pursuant to notice, if counsel, though previously instructed, do not show cause on the very day, or arrange with the counsel who obtained the rule, not to bring on the rule for discussion until both agree upon the time of disposing of it, he will be too late on the next day, and if the rule has in due course become absolute, the Court will not open it or allow him to show cause. (*s*)

32. The conduct of counsel on each side in preparing to support or oppose a rule.

Before the rule is discussed each counsel should make himself *master of every part of the affidavits*, and make his own analysis of dates and principal events, and be ready instantly to point out to a line where any particular allegation affirmative or negative will be found. He must also take a comparative view of each affidavit, contrasting the negative allegations with those in the affirmative, so as to attain a certain view of each, and by private annotations be fully prepared at any instant, without loss of time, to show to the Court the exact result, and concisely to comment on the same as well as upon any peculiar mode of swearing.

Formerly it was the practice to hand the affidavits on each side to an officer of the Court, who read the same distinctly to the Court; but that course has for many years been disused, and it is expected by the Court of counsel that they be prepared not only to state in detail and in his own arrangement every part of the affidavits, but instantly when called upon and without regard to any logical order to separate and state how any particular part of one affidavit has been answered in another. The Courts usually evince great kindness towards the bar, especially beginners, and avoid embarrassing them;

(*q*) *Ante*, 576.
(*r*) Price, Prac. 293.
(*s*) *Scott* v. *Marshall*, 2 Tyr. 176, and note, 2 Cromp. & Jerv. 60.

and suffer them to pursue their own course of argument; but after a barrister is supposed to have acquired some self-possession and tact, it will sometimes occur that each of the judges will almost simultaneously put to such counsel numerous isolated questions, and which in general he must instantly answer, or he might excite a presumption that he knows he cannot answer the same. If, however, a counsel knowing that he can answer such question satisfactorily, but still finds that the so doing would embarrass or lead him away from a better line of argument, he may then respectfully crave the indulgence of the Court to hear him according to his own arrangement.

In general, however, it is better to give a prompt answer to the questions of each judge, however calculated to embarrass; for if a counsel do not instantly answer such inquiry from the Court, it is either supposed that he has not sufficiently read or attended to the terms of the affidavits, or that in fact he knows the result is against him; and not only an unfavourable supposition is excited, but even before he can explain, his more attentive or acute adversary gains an advantage which, if he had been more on the alert, would not have been the result; and not unfrequently his client and the auditors draw unfavourable conclusions against the talent of the counsel, however learned and able he may be, merely because he has been deficient in tact.

33. Of discharging a rule nisi.

In the Exchequer it is necessary to give the opposite party notice of an application intended to be made to discharge a rule nisi, for *an order* of the Court, and which is a rule peculiar to this Court, and in this respect differs materially from the ordinary rule to show cause.(t) In general when a rule nisi has been obtained, the proper mode for the opponent's disposing of it, is by his showing cause in due course; but if on or after the time appointed by the rule to show cause has elapsed, the counsel who moved the rule nisi state to the counsel who is to show cause that he is not yet instructed to support such rule, then the party thus instructed may move to discharge the rule, and in general with costs. In case of rules nisi, for judgment in case of a nonsuit, it is usual for the counsel on each side not to attempt to bring on the rule for discussion until two or three days have elapsed after the day appointed in the rule nisi for showing cause, and it is injudicious immediately to press to make the same absolute; because it very frequently

(t) *Raby* v. *Clarenshaw*, 11 Price, 152.

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occurs that some counsel has been instructed to oppose the rule, and in that case the Court will open the rule and much trouble will be occasioned in getting back the brief, and bringing on the rule for proper discussion.

34 Professional conduct of barristers towards each other in disposing of rules nisi.

Considering that barristers have to advocate very opposite interests and necessarily congregate, and are constantly placed in collision, it is scarcely necessary to observe that it is of the utmost consequence that they should evince uniform courtesy, if not kindness and forbearance, towards each other, and as much candour and even liberality in assisting each other as professional duty will permit, especially in communicating intended points of argument and authorities proposed to be cited, and happily, in general barristers set a high example in this respect. There are, however, *two uncourteous practices* sometimes observable, (though in general confined to junior barristers,) viz. the one, that of *withholding from a counsel supporting a rule the affidavits in answer so long, that it is scarcely practicable for him to read them in time for the discussion;* and the *second,* that of a counsel who finds upon the affidavits it is most probable the rule will be determined against him, *purposely leaving the Court about the time* when his opponent would in the ordinary course of business reasonably expect to bring the rule on for discussion, and thus from day to day delaying the proceedings, to the no small injury of the client and prejudice of the opponent counsel. The counsel, prejudiced by such ungenerous conduct, being anxious to avoid troubling the Court with his particular grievance, and to keep from public view any matter derogatory from the general character of the profession, submits to the grievance; but it behoves the rest of the bar and the practitioners of the Court to mark their disapprobation of such conduct.

35. Arguments upon affidavits and documents in support of rule nisi.

We have seen that as regards *facts* for or against a rule nisi, they must in general be laid before the Court by affidavit pro and con, or verified documents, but that there are few exceptions. (*u*) In general, when a rule nisi is brought on for discussion, the counsel for the party *opposing* it begins and states the terms of the rule nisi, and then very concisely the points which he supposes are intended to be relied upon by the party who obtained it, and then he assumes that the application

(*u*) *Ante*, 535, 536, as to the general necessity for affidavits, and the requisites thereof.

is completely answered; but if he do not entertain a strong opinion on that point, it is then advisable at once to begin with the affidavits, for it will be found as a general rule as impolitic as it is discreditable for counsel to pledge even his opinion to a result, as it is immoral and improper to do so, except in accordance with a genuine opinion. When a counsel entertains a strong opinion in favour of his case, then there is no reason why his client should not have the probable advantage of a zealous assertion of that opinion; but if such opinion do not exist, or be not well founded, the counsel would, by affecting it, forfeit the general estimation and credit of the Court. In the latter case, however, no counsel has a right to surrender the case of his client and admit that it is untenable, especially as it is well known that very frequently counsel, or one of several counsel, will succeed in argument quite contrary to the private opinion of all. In stating the affidavits pro and con, perfect knowledge of each as well as of the modes of swearing is indispensable, and the more compact the statement, and the more acute the comparison of the affidavits the better; and the counsel in many cases closes his observations with very concise remarks on the law applicable to the case.

The counsel in *support of the rule* then observes upon the affidavits on each side, taking care to call the attention of the Court to each most material part of the affidavits, and which the counsel opposed to him may have omitted to state faithfully, and if a very important allegation in support of the rule remains entirely unanswered, or only evasively so, he will particularly rely on that fact, and if the contra swearing is loose, that also will be remarked upon. When *further* enquiry by *additional* affidavits not in general admissible in Court, then both or one of the counsel may find it expedient to pray that the rule be referred to the master or prothonotary, and will thereupon particularly request the Court to direct that such officer shall or may examine the parties or witnesses either by affidavit or *viva voce*.(x)

36. Formal objections, when to be taken.

We have seen that either counsel is at liberty, even after arguing the merits, to take an objection to the form or the substance of an affidavit on either side,(y) or of the terms of rule nisi, or of the copy thereof served, as that it is not correctly intituled in the cause; (z) but when the objection is decisive against a rule, and the discussion upon the merits would

(x) *Noy* v. *Reynolds*, 1 Harr. & Woll. 14; *Dicas* v. *Warne*, 2 Dowl. 812; *ante*, vol. iii. 36, 37.

(y) *Barham* v. *Lee*, 4 Moore & Scott, 327; 2 Dowl. 779, S. C.

(z) *Wood* v. *Critchfield*, 3 Tyr. 235.

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occupy much time of the Court, it is more usual and preferable to take all technical objections in the first instance.

37. How the Court or judge decide upon conflicting affidavits.

Unfortunately, by the use of written *affidavits*, the advantage to be derived from a *viva voce* examination of a deponent before the Court, and from a view of his *countenance*, and of the *manner* of giving his testimony, are wholly lost, and even the age, education, and moral character of the deponent, are sometimes concealed from the Court, and the advantage of a *rigid cross examination*, calculated to elicit truth, is wholly taken away. (*a*) Sometimes, therefore, when the Court find the statements in the affidavits irreconcilable, they will either refer the matter to the master to receive further information, and sometimes even oral evidence; (*b*) and in cases of great difficulty will direct *an issue* to be tried by a jury. But in general, when the party swearing last very *positively and distinctly denies the matter stated in the affidavit in support of the rule*, the Courts have no alternative but to discharge the rule, especially in cases where the applicant has another remedy either at law or in equity.

38. Of the Court *making a rule nisi absolute*, and on what terms, *or discharging* the same, and on what terms.

If the Court or a majority of the judges should, upon the affidavits and documents before them, decide *in favour* of the application or rule nisi, it is then said to be *made absolute*; but it by no means follows that it must or will be so in the very terms of or to the full extent of the prayer in the rule nisi, for the Courts have in general an unlimited discretion in this respect; they can direct that the rule shall be absolute in part, and discharged as to the residue; or absolute conditionally upon the party moving performing some act, or absolute (as in the case of a rule to discharge a prisoner out of custody) on the terms of that party agreeing not to bring any action of *trespass* for false imprisonment, but that he shall be at liberty to bring an action *on the case* for *maliciously holding him to bail* without reasonable cause. (*c*) If the rule direct that the party to be discharged out of custody shall undertake not to bring

(*a*) See *post* as to witnesses, and evidence as to the supposed examination of a witness in open Court, before a judge and jury, subject to an immediate cross-examination.

(*b*) *Ante*, 595, note (*x*).

(*c*) *Gray* v. *Shepherd*, 3 Dowl. 442. The distinction is *material*, for when in consequence of the irregularity the defendant might bring an action of *trespass* for the *immediate wrongful imprisonment* under the writ, he would be necessarily entitled to some damages and costs, but when by the terms of the rule absolute he is only to be at liberty to bring an *action on the case*, he would not recover, unless he prove that the arrest was malicious, or without reasonable cause, and which action frequently fails

any action, such undertaking must be prepared, signed and delivered at his expense. If a rule to discharge a party out of custody be made absolute on account of irregularity in an arrest, and the judge offer to give the applicant costs if he will undertake not to bring any action (a condition frequently proposed,) (*d*) but which terms being refused, the order for the discharge is unconditional, and nothing is said about the costs of the motion or rule, then the party may, in an action of trespass for the false imprisonment, recover the costs of such previous proceeding. (*e*)

39. Of the *interlocutory* costs of motions and rules. (*f*)

The *costs* relative to summons, motions and rules (usually termed *interlocutory*) are in general entirely in the discretion of the *judge* as regards a summons and order; (*g*) and of the Court as to the latter, excepting in a few particular cases, where a statute or rule is imperative; as the Reg. Gen. Hil. Term, 4 W. 4, reg. 6, which always gives the costs on a successful summons to strike out a second count for the same cause of action. It will be found, however, that such discretion is constantly exercised with the utmost regard to strict justice, and according to the fairness in the conduct of the parties. Thus, as regards motions and rules nisi to set aside proceedings for irregularity, however it may be regretted that a practitioner will ever take a trifling objection in respect of a defect which cannot in reality have prejudiced his client, yet as it is essential that uniformity in regular practice should be observed, the Courts therefore will in general give the party who has explicitly pointed out and established his objection, the costs of his motion and of the rule to set aside the proceeding; because, if such costs were refused, probably great and prejudicial laxity in practical proceedings would supervene. (*h*) But if the party applying, instead of candidly stating his objection, and affording an opportunity to his opponent of promptly, without increase of expense, rectifying his error, *refuse* to inform him, or to accept costs up to the time when tendered, and persist in increasing the costs, then the Courts will allow him the costs only of his first proceeding, and will even make *him pay* to his opponent the *subsequent* costs. (*i*) In short, it will in general be found that the judges, in the exercise of this discretionary jurisdiction, so de-

(*d*) *Marshall* v. *Davison*, 2 Tyr. 315.
(*e*) *Pritchett* v. *Boevey*, 3 Tyr. 949.
(*f*) See in general Tidd, 503, 504; 2 Arch. K. B. 4th ed. 888, 998.
(*g*) *Ante*, vol. iii. 29 to 32, 80, 81, and the Court in banc will not interfere with a single judge's jurisdiction or decision as to costs, *Davy* v. *Brown*, 1 Bing. N. C. 460; 1 Hodges, 22.
(*h*) Costs in general allowed when irregularity established, and why, per Dampier, in notes, 1 Chitty's Rep. 399.
(*i*) *Ante*, 529, 530, 571, as to notice of irregularity and notice of motion.

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cide as regards these interlocutory costs, as to convince practitioners that practically it is their better interest on all occasions at least to evince candour in taking technical objections. It has naturally occurred in a long course of practice, that although the jurisdiction over interlocutory costs is principally discretionary, yet a succession of decisions have established some few *general* principles and rules, most of which have been collected by Mr. Tidd; (*j*) and it will here only be necessary to notice a few *other* rules or qualifications and *subsequent* decisions.

As respects rules nisi for *irregularity* it seems that unless costs be *expressly prayed*, i. e. the rule be drawn up *expressly requiring* the opponent to pay costs, it will not be made absolute *with costs*, because the Court can give no more than he asked; (*k*) and in that case, if there was any reasonable ground for the rule, the Courts will, it is said, in general, in case they discharge it, do so *without costs*, (*l*) especially if it be discharged in consequence of some technical objection to the affidavit or rule nisi; or they will sometimes order the costs to abide the event of the suit. Where there have been for some time reported decisions upon a matter of regularity, as, for instance, the requisites of an affidavit to hold to bail, and, in accordance with such decisions, a rule be made absolute for setting aside a bail-bond upon a similar defect in the affidavit, it will in general be *with costs*, because the practitioner had no excuse for his ignorance or inattention. (*m*) And where nothing is said about costs in the rule or by the Court on making it absolute, they are considered as costs in the cause, i. e. the party ultimately succeeding will then have his costs relating to such motion and rule, provided the rule be made *before* judgment; (*n*) though if a rule be made *after* judgment, then no costs will be recoverable, unless expressly provided for by the rule. (*o*) When a counsel therefore moves for a rule nisi, and doubts his success, it is considered most prudent not to pray costs by the terms of the rule; but when the *irregularity is clear*, costs

(*j*) Tidd, 9th ed. 503, 504; and see 2 Arch. K. B. 888, 998.

(*k*) *Cook* v. *Allen*, 3 Tyr. 380; *Ryalls* v. *Emerson*, 2 Crom. & M. 468; and per Bayley, B. in *The King* v. *Sheriff of Middlesex*, 2 Dowl. 5, "If the rule had "prayed for costs, it would have been ab- "solute with costs:—we cannot give you "more than you ask;—you asked all "that was prudent. If the costs had "been asked for, they would have been "in the rule. I consider it as the clear "and settled practice of the Court that "we cannot give more than has been "asked for. Where a party merely asks "to set aside proceedings for irregularity, "no costs are given." But see 2 Arch. K. B. 4 ed. 998.

(*l*) 1 Chitty's R. 399, note to *Tomlin* v. *Preston*, Tidd, 504; see also *Dawson* v. *Bowman*, 3 Dowl. 161.

(*m*) *Mollineux* v. *Dorman*, 3 Dowl. 662.

(*n*) Tidd, 504.

(*o*) *Id.*

should be prayed, or they will not be obtained. (*p*) If a rule nisi be moved *with costs*, i. e. drawn up requiring the opponent to *pay costs*, and the rule be made absolute in the very terms of the rule nisi, either without cause shown, or without sufficient cause, or some peculiar circumstances of vexatious proceedings on the part of the applicant, established by affidavit, the rule will be absolute *with costs*, which must then be *immediately* paid by the party in the cause guilty of the irregularity. On the other hand, if a rule nisi for *irregularity* be drawn up *with costs*, and on cause being shown the applicant fail in his objection, or his affidavit in support of the rule nisi be informal, then it will in general be *discharged with costs*, and the party who moved will immediately have to pay to the opponent the costs he incurred in showing cause. (*q*) Indeed by the Reg. Mich. T. 37 Geo. 3, in K. B., it is expressly "*ordered that in* "*all cases where a rule is obtained to show cause why proceed*-"*ings should not be set aside for irregularity with costs, it is* "*to be understood to be discharged with costs, and the latter* "*rule must be drawn up accordingly.*"

Sometimes the rule absolute expressly directs that costs shall be paid to the applicant, and sometimes *by him*, although he succeed; in other cases the costs are directed to be costs in the cause, in which case they are not taxed or paid till the conclusion of the action; (*r*) sometimes also, when nothing is said about costs in the rule nisi, or on discharging the same, the costs of the application and of resisting the same are consequently costs in the cause. (*s*)

But as regards summonses, motions, and rules, upon subjects *subsequent* to the judgment, (*t*) or *collateral* to the action, the costs thereof cannot become costs in the cause, and therefore the party succeeding upon such a collateral proceeding should take care to apply for costs, and obtain them by the rule absolute, or the rule discharging the same; (*u*) as where a defendant was discharged out of custody on the ground of coverture, or arrest by a wrong name, the costs of the application not being costs in the cause, the defendant must endeavour to recover the same at the time the motion is disposed of. (*u*)

Where a rule nisi prays for several things, to some of which the party is entitled, and to others not, but cause is shown *against all*, no costs are in general given on either side, although

(*p*) *The King* v. *Sheriff of Middlesex*, 2 Dowl. 5, and *ante*, 598, (*k*).

(*q*) Per Lord Lyndhurst in *Blomfield* v. *Blake*, 2 Dowl. 275, and 1 Chitty's R. 399; *Tilley* v. *Henly*, 1 Chitty's R. 136, 137.

(*r*) *Read* v. *Coleman*, 2 Dowl. 354; *Rowe* v. *Rhodes*, 4 Tyr. 221.

(*s*) *Kidd* v. *Mason*, 3 Dowl. 98.

(*t*) Tidd, 504; *ante*, 598.

(*u*) *Mummery* v. *Campbell*, 2 Dowl. 798; 10 Bing. 511.

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if notice had been given that cause would be shown only against the untenable part of the rule, the party showing cause successfully would then have had costs. (x)

If both parties be wrong, as one in asking too much, and the other by tendering too little, then in general costs will not be given to either, but each must bear his own costs. (y) And if a rule proper in its terms and prayer, and not in *respect of a mere irregularity*, fail on account of a *technical objection* taken to the affidavit on which such rule was founded, the Court will discharge it without costs. (z) But if the rule be obtained in respect of a mere technical irregularity, as a defect in a writ of summons, and it appear that the affidavit in support of the application be defective, the rule nisi will be discharged with costs. (a) And if a rule nisi for contempt of Court be obtained on frivolous grounds, the Court will discharge it with costs. (b) So if a rule has been moved for either from a want of proper care in obtaining correct information, or from having received incorrect information, that is the misfortune of the applicant, but the opponent is not on that account to be brought before the Court by that which is only an experiment, and he ought to have his costs. (c) Where a *prisoner struggling for liberty* has obtained a rule nisi, which, on showing cause, is discharged, the Courts will not always subject him to costs. (d)

So where a doubtful and material point of practice is raised by a rule nisi, although the Court may discharge the rule, yet they will not in general subject the party moving it to costs; nor on the other hand make it absolute with costs. (e) And on setting aside a judge's order regularly obtained, the practice is not to make the party who obtained the order pay costs for endeavouring to sustain it; (f) and the same practice prevails as regards a motion and rule for the master to review his taxation; (g) for in both those cases the proceeding was sanctioned by proper authority, though ultimately not sustained.

If the Court or a judge expressly adjudicate upon the question of the costs of a summons, motion, or rule, the subject cannot again be discussed in an action or subsequent proceeding. (h) But we have just seen that where a party is by order

(x) *Aliven* v. *Furnival*, 2 Dowl. 49; Tidd, 504; *M'Andrew* v. *Adam*, 1 Harr. & Wol. 270; 3 Dowl. 120, S. C.

(y) Per Ld. Lyndhurst, C. B. in *Whalley* v. *Barnett*, 2 Dowl. 33, 34.

(z) *Howorth* v. *Hubbersty*, 1 Gale, 47; 3 Dowl. 455, 456.

(a) *Smith* v. *Crimp*, 1 Dowl. 519; *Macher* v. *Billing*, 4 Tyr. 812; *ante*, vol. iii. 78, note (z).

(b) *Wheeks* v. *Whiteley*, 3 Dowl. 536.

(c) Per Williams, J. in *Doe* dem. *Lambert* v. *Roe*, 3 Dowl. 558.

(d) Per Taunton, J. in *Morley* v. *Hall*, 2 Dowl. 497.

(e) *Dawson* v. *Bowman*, 3 Dowl. 161.

(f) *Wigley* v. *Tomlins*, 3 Dowl. 9; *Nurse* v. *Geeting*, *id.* 158; *Hargrave* v. *Holden*, *id.* 176; *Lewis* v. *Dalrymple*, *id.* 434; *ante*, vol. iii. 34, n. (g), 35, note (r).

(g) *Ward* v. *Bell*, 2 Dowl. 76; *ante*, vol. iii.

(h) *Loton* v. *Devereaux*, 3 Bar & Adol. 343; *ante*, vol. iii. 80, 81.

or rule discharged out of custody, but nothing said therein about costs, then in an action of trespass for false imprisonment the costs of the rule may be recovered as special damages. (*g*)

Although a judgment by default has been signed strictly regularly, but merely because the special pleas had not been signed by counsel, a judge in vacation will set the judgment aside and direct that the costs shall be costs in the cause, because the plaintiff's attorney previously knew that the pleas had been settled by counsel and were pleaded by leave of the Court, and yet signed judgment without any previous notice of the objection to the pleas, or his intention to do so; the learned judge animadverted upon the signing judgment under such circumstances as reprehensible sharp practice, not entitling the attorney to immediate costs. (*h*)

40. Of the Court imposing terms.

We have before partially considered the jurisdiction of the Court in deciding upon a rule to impose terms. (*i*) In general if an application be made to either of the Courts to discharge a defendant out of custody on the ground of illegality or irregularity in the arrest, the Court, if they grant the application, will only do so on the terms of bringing no action, (*k*) or no action of *trespass* for false imprisonment, but leaving the defendant to bring an *action on the case* for a malicious arrest; but the Court has no right to impose the terms of bringing *no action*, if the proceedings were altogether void. (*l*)

41. Terms of the rule absolute.

When a rule is absolute for the payment of money, it is in general advisable that it should direct payment to the principal party, or to his attorney in the country, or to his attorney or agent in London, so that either may make a demand sufficient to sustain an attachment (*m*) and avoid the expense and difficulties sometimes incident to a demand by a person having a formal power of attorney.

In cases of difficulty or particularity sometimes the chief justice, or chief baron, or other judge of the Court, will himself oblige the counsel by framing the terms of the rule absolute. In all cases it is advisable for the counsel on each side, whilst the verbal decision of the Court is fresh in recollection, and whilst the Court is sitting, on the same day to agree upon the precise terms of the rule, and subscribe their names as in-

(*g*) *Pritchett* v. *Boevey*, 3 Tyr. 949; *ante*, vol. iii. 80, 81.

(*h*) ———, assignees, &c. v. ———, Exchequer, *cor.* Gurney, B. July, 1835.

(*i*) *Ante*, part v., vol. iii. p. 280.

(*k*) Per Alderson, B. in *Reddell* v. *Pakeman*, 3 Dowl. 721; 1 Gale, 104, S. C.

(*l*) Per Alderson, B. in *Reddell* v. *Pakeman*, 3 Dowl. 721.

(*m*) *Dennell* v. *Pass*, 3 Dowl. 632.

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structions to the officer of the Court; and in cases of doubt in the exact terms of the decision, the matter may be shortly mentioned to the Court on the same day. And as a further precaution, it is recommended to practitioners, before they serve any rule of importance, to ascertain from their counsel whether the rule has been properly framed.

42. Notice of and appointment for taxing interlocutory costs.

In general by Reg. Gen. Trin. T. 1 W. 4, reg. 12, "before "*taxation of costs one day's notice* is to be given to the opposite party."(*n*) But by Reg. Gen. Hil. T. 4 W. 4, reg. 17, "notice of taxing costs shall not be necessary in any case where "the *defendant has not appeared* in person, or by his attorney "or guardian, notwithstanding the above rule."(*o*) And this rule being considered directory only, the omission to give the notice does not ipso facto render a judgment and execution void.(*p*) And by Reg. Gen. Hil. T. 2 W. 4, r. 92, "one ap-"pointment only shall be deemed necessary for proceeding in "the taxation of costs, or of an attorney's bill."(*q*) It seems that at least in the Exchequer no fee is payable to the master for his taxation.(*r*)

43. The master's allocatur of costs.

The master or prothonotary having taxed the costs and fixed the amount, he dates and signs what is termed his *allocatur*, stating the amount in one aggregate sum, as thus: "I allow "£——. Le Blanc. —— August, 1835." Such allocatur belongs to the party in whose favour it has been made, though the opponent may perhaps be entitled to keep a copy; and upon motion to the Court a rule nisi may be obtained and made absolute for compelling the delivery of such allocatur to the proper party.(*s*)

If either party be dissatisfied with the amount, he must make *affidavit* of the master having made his allocatur,(*t*) and in such affidavit state the *particular items* which are incorrect, and in what respect, and then pray a rule for reducing or otherwise altering the amount of the costs.(*u*)

44. Of enforcing payment of interlocutory costs by attachment.(*x*)

The usual mode of enforcing payment of interlocutory costs is by *attachment*, though sometimes they may be recovered by action. In order to proceed by attachment the order must afterwards be made a rule of Court, and the rule must be *absolute and imperative* for the payment of costs, for if either be only

(*n*) Jervis's Rules, 31, note (*y*).
(*o*) Jervis's Rules, 92; *Clark* v. *Jones*, 3 Dowl. 277.
(*p*) *Perry* v. *Turner*, 2 Tyr. 128; 2 Crom. & J. 89, S. C.
(*q*) Jervis's Rules, 68, note (*p*).
(*r*) Per Parke, B., *Eudes* v. *Everatt*, 3 Dowl. 690.
(*s*) *Doe* v. *Robinson*, 2 Dowl. 503.
(*t*) *Cleaver* v. *Hargrave*, 2 Dowl. 689.
(*u*) *Clarke* v. *Jones*, 3 Dowl. 277.
(*x*) See the practice as to enforcing an award by attachment, *ante*, vol. ii. part iii. 122 to 124.

conditional no attachment lies, although the party has availed himself of so much of the rule as was in his favour, but refused to perform the other part.(*x*) The judge's order made a rule of Court must also contain an express order to pay.(*y*) In order to proceed by attachment *all* judge's orders in any way connected with the adjudication of costs, and the master's allocatur, must first be made rules of Court, because it is only the non-observance of the unqualified direction of *the Court in banc* that constitutes the *contempt* to be punished by attachment.(*z*) Therefore, where the demand of payment of costs was made before the master's allocatur had been made a rule of Court, the motion for an attachment for nonpayment was refused,(*z*) and if inadvertently, without making certain essential judge's orders rules of Court, an attachment be obtained, it will be set aside; but after making such judge's orders rules of Court, and producing to the party *personally* such rules and the original allocatur, and leaving copies of each document, and again demanding payment, an attachment may then, upon an affidavit of such last service, be regularly obtained.(*a*)

45. Care to be observed in *served copies* of rules.

As respects any *rules of Court*, upon which the allocatur is founded, great accuracy is essential, and the *copies thereof* must be faithfully correct; and, therefore, where in an action against Calvert the copy of the rule served omitted the *t*, an attachment obtained for non-observance was set aside as irregular, with costs, although the party had promised to pay.(*b*)

46. Of personal service of rules and allocatur, and leaving copies of each.

A *personal service* of the original rule and allocatur, and a *personal demand* made by a party entitled to receive of the party bound to pay or deliver, is always essential to perfect the contempt of Court, and, as we have seen, cannot be dispensed with,(*c*) and this as well in proceedings against an attorney as in other cases.(*d*) And all these formalities should *concur at the same time*, and not some at one time, and others subsequently.(*e*) But if the party to be served knock down the person who has nearly completed the service and explained his purpose,(*f*) or close the door of a house upon him, and then

(*x*) *Rese* v. *Fenn*, 2 Dowl. 182; *Turner* v. *Gill*, 3 Dowl. 30; *Ex parte Townley*, *id.* 39; see as to *conditional* judge's order, *ante*, 566, 567.

(*y*) *Ryalls* v. *Emerson*, *id.* 357; 2 Cr. & M. 467.

(*z*) *Chilton* v. *Ellis*, 2 Crom. & M. 459; 2 Dowl. 338, S. C.; *Ryalls* v. *Emerson*, 2 Crom. & M. 467; *Woollison* v. *Hodgson*, 3 Dowl. 178.

(*a*) *Ryalls* v. *Emerson*, 2 Crom. & M. 464.

(*b*) *Rex* v. *Calvert*, 2 Crom. & M. 189.

(*c*) *Ante*, 584, 585; *Dicas* v. *Warne*, 1 Hodges, 91.

(*d*) *Albin* v. *Toomer*, 3 Dowl. 563.

(*e*) *Ex parte Lowe*, 4 Bar. & Ald. 412; *Rogers* v. *Twisdale*, 3 Dowl. 572.

(*f*) *Wenham* v. *Downes*, 3 Dowl. 573.

the documents are placed under the door, (g) or if a complete service be prevented by fraud, (h) or where the documents have certainly come to the hands and knowledge of the proper party, (i) either of these circumstances may dispense with the usual formula.

In general the *original* rule and *original* allocatur must be shown to the party required to pay, (k) at the *very same time* (l) as the legal and authorized demand of payment or performance of other directed act, and such *original* rule and allocatur should be so produced and shown, that the party thereby called upon to pay *may be able to read it;* but it need not be placed in his hand or parted with; (m) and where the party endeavouring to serve the defendant went to his house and knocked at his door, and the defendant thereupon came to it, and the deponent then showed him the original rule and allocatur indorsed, and demanded the amount of costs claimed on the allocatur, and the defendant then shut the door in the deponent's face, declaring that he would not be served, and the deponent then pushed a copy of the rule and allocatur under the door and came away, these facts were holden sufficient to authorize the Court in granting an attachment; (n) and when the party sought to be served, by his violence, as by knocking the party down, prevented the personal service or demand, he thereby dispensed with the same, and an attachment may be issued. (o) And when it is clear that the copy of a rule and allocatur have actually come to the possession of the defendant an attorney, the Court will grant a rule nisi for an attachment, although *strict personal* service had not been effected. (p) An exact copy of all requisite rules, *enlargements,* &c. must also be personally produced to and left with the party at the time of the demand of payment, and the mere leaving a copy with the servant of the party, after showing the original rules to him, will not suffice. (q) But where a party against whom a rule nisi for an attachment had been obtained appeared, and objected that such rule nisi had not been *personally* served, the Court notwithstanding made the rule absolute, because in this case the contempt for which the attachment was prayed,

(g) *Rex* v. *Koops*, 3 Dowl. 566.
(h) *Doe* d. *Frith* v. *Roe*, 3 Dowl. 569, *sed quære.*
(i) *Phillips* v. *Hutchinson*, 3 Dowl. 583, a rule nisi granted.
(k) *Parker* v. *Burgess*, 3 Nev. & Man. 36.
(l) See 603, note (c).
(m) *Calvert* v. *Redfearn*, 2 Dowl. 505.
(n) *Rex* v. *Koops*, 3 Dowl. 566.
(o) *Wenham* v. *Downes*, 3 Dowl. 537.
(p) *Phillips* v. *Hutchinson*, 3 Dowl. 583.
(q) *Parker* v. *Burgess*, 3 Nev. & Man. 36.

was in not obeying a *previous* rule which had been personally served, which distinguished this case from the general rule. (r)

47. *Personal demand* by a party entitled to receive payment.

There must be a *personal demand* of the costs made even of an attorney before an attachment, though now in the Exchequer no subpœna for the costs is necessary. (s) The demand should be personally in the *presence* and *hearing* of the party who is to pay, and, therefore, service by leaving the allocatur with the daughter of the party, he being then in the house, will not suffice, and Per Lord Lyndhurst, C.B., "It is much better in cases of this kind, where the liberty of the subject is so deeply concerned, to adhere to the strict rule that personal service should be required." (t) The demand must also be made *by at least one of the persons named in the rule to whom* payment is to be made, or a document delivered, and not by a person acting on his behalf, but not expressly named in the rule. (t) If by the terms of the rule the payment is to be made *to the plaintiff, or his attorney, or agent*, a demand by the attorney's clerk will not suffice. (u) But in such a case a demand made by the attorney in the country, if properly concerned, will suffice; (x) and in order to obtain an attachment for nonpayment of costs, pursuant to the master's allocatur, it must expressly appear by the *affidavit* on which the motion is founded, that the persons who demanded the payment were the identical persons named in the allocatur to whom the payment should have been made. (y)

If the demand of payment be made by an agent of a person named in the rule, then, unless such agent be particularly identified by the terms of the rule, he must have a regular power of attorney under seal, authorizing him to receive, and the original power must be produced, and a copy left, and besides the original rules and allocatur the execution of the power of attorney must be verified, and the due service of all these, and a demand by the agent, at the time sworn to. (z)

A fortiori it is necessary that the demand should be made personally by one of the parties *to receive upon the party*

(r) *Levy* v. *Duncombe*, 1 Gale, 60; 3 Dowl. 447, S. C.

(s) *Doe* v. *Barker*, 3 Dowl. 217.

(t) *Stannell* v. *Tower*, 1 Crom. M. & R. 88; and *Parker* v. *Burgess*, 3 Nev. & Man. 36; *Woollison* v. *Hodson*, 3 Dowl. 178, overruling *Green* v. *Prosser*, 2 Dowl. 99; and *Allier* v. *Newton*, *id.* 582; and see *Dicas* v. *Warne*, 1 Hodges, 91.

(u) *Ex parte Fortescue*, 2 Dowl. 448; *France* v. *Wright*, 3 Dowl. 325; *Hartley* v. *Burlow*, 1 Chitty's Rep. 229, cited and approved in *Dennell* v. *Pass*, 3 Dowl. 632, 633.

(x) *Dennell* v. *Pass*, 3 Dowl. 632.

(y) *France* v. *Wright*, 3 Dowl. 325.

(z) *King* v. *Packwood*, 2 Dowl. 570; *ante*, part iii. vol. ii. p. 123.

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himself, who has been ordered to pay or deliver; and, therefore, where a judge's order directed that on payment or tender of the debt and costs to the plaintiffs, their attorney, or agent, *the plaintiffs should deliver up to the defendant* certain deeds; and an attachment was moved for on an affidavit that the money was tendered to *the plaintiff's attorney's agent*, and the deeds demanded, but they had not been delivered: it was held, that the *affidavit* was insufficient, and that notice should have been given to the plaintiffs that the money had been tendered to the agent, and then *a demand made personally upon them.* (*a*) It is advisable that a demand and performance of the terms of a rule be made recently before the application for an attachment for the non-performance; if, however, the contempt was incurred on the 2d of February, by nonpayment of costs then demanded, it is not too late to move on the 22d of April following. (*b*)

48. Affidavit of service and *motion* and rule for attachment when nisi only, or when absolute in first instance.

The only effect of the *personal service* of the original rules and copies, and demand of the money or performance of any other act, is to *perfect* or *complete* the *contempt;* but still, before an attachment for such contempt can be obtained, the party desirous to obtain the same must make *affidavit* of the regular service of the rules and copies, and demand, and before moving the Court for an attachment, and which motion should be made within a reasonable time after the contempt was incurred; though if it were incurred by nonpayment of costs in February, the motion may be made in the following April. (*c*) Even then, by the practice of all the three superior Courts, the party can, on application for an attachment for non-payment of costs, pursuant to the master's allocatur *between attorney and client*, only obtain a *rule nisi* in the first instance, though it is otherwise when between party and party; (*d*) and a rule for an attachment for nonpayment of costs between attorney and client is only nisi; though when the motion is for nonpayment of costs between party and party it is absolute in the first instance. (*e*) But by Reg. Trin. T. 17 Geo. 3, in King's Bench, it was ordered, "That attachments shall be absolute "in the first instance only in the three following cases, viz. "*first*, for nonpayment of costs on the master's allocatur; *se-*

(*a*) *Evans and wife* v. *Millard*, 3 Dowl. 661.

(*b*) *Rex* v. *Rogers*, 3 Dowl. 605.

(*c*) *Id.*

(*d*) *Spragg* v. *Willis*, 2 Dowl. 531; *Green* v. *Sight*, 3 Dowl. 578; *ante*, 576, 7.

(*e*) *Boomer* v. *Mellon*, 2 Dowl. 533; *Green* v. *Sight*, 3 Dowl. 578; *ante*, 577.

"*condly*, against a sheriff for not obeying a peremptory rule to "return a writ, or to bring in the body; and, *thirdly*, for contempt of the Court in the execution of the process of the "Court:" (*f*) and a party cannot have a rule absolute in the first instance for an attachment for not paying costs pursuant to a rule of Court where those costs form part of a rule, for disobedience of which a rule nisi only for an attachment can be granted. (*g*)

49. Execution of attachment, and who exempt or discharged.

Bankruptcy and *certificate* are sometimes a discharge from liability to be attached merely for nonpayment of costs, but in other cases not so: (*h*) and a person arrested or imprisoned under an attachment for contempt in non-payment of money pursuant to a rule of Court, is not entitled to be discharged upon tendering the amount to the officer. (*i*)

50. Interlocutory costs when or not recoverable by *action*.

It is a general rule, that *interlocutory costs* are not recoverable by action, at least when the order or rule under which the same were payable was pronounced in *invitum*, and not under circumstances from which *an agreement* to pay such costs could be inferred. (*k*) But if an order or rule for payment of costs be by *consent*, an action may then be sustained, (*l*) or the amount of the costs may be proved as a debt under a fiat in bankruptcy. (*m*)

51. Setting off interlocutory costs, when.

By Reg. Gen. Hil. T. 2 W. 4, reg. 93, it was ordered "that "no set-off of damages or costs between parties shall be "allowed to the prejudice of the attorney's lien for costs in "the particular suit against which the set-off is sought; "*provided*, nevertheless, that *interlocutory costs in the same* "*suit* awarded to the adverse party may be deducted." This assimilated the practice of Common Pleas and Exchequer to that of King's Bench. (*n*) So that under such a proviso a party to an action has an absolute right to set off or deduct

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(*f*) *Godbey* v. *Dewes*, 2 Dowl. 747; 3 M. & Scott, 556. On a return of a rescue a motion for an attachment is absolute in first instance.

(*g*) *Ex parte Townley*, 3 Dowl. 39. But see *Ex parte Grant*, *id.* 320.

(*h*) *Jacobs* v. *Phillips*, 1 Crom. M. & Ros. 195; 2 Dowl. 716; but see *Ex parte Grant*, *id.* 320.

(*i*) *Pitt* v. *Coombes*, 3 Nev. & Man. 212.

(*k*) *Emerson* v. *Lashley*, 2 Hen. Bla. 248; *Jacobs* v. *Phillips*, 1 Cr. M. & R. 195; *Wentworth* v. *Bullen*, 9 Bar. & Cres. 850.

(*l*) Per Parke, B. in *Wentworth* v. *Bullen*, 9 Bar. & Cres. 850; *Porter* v. *Cooper*, 1 Cr. M. & Ros. 387.

(*m*) *Ryley* v. *Byrne*, 2 B. & Adol. 779.

(*n*) Tidd 339, 680, 992.

CHAP. XVII. SECT. IV. OF MOTIONS AND RULES. the amount of *interlocutory* costs adjudged in his favour in any stage of the *same action* against similar costs that may have been adjudged against him in that action, (*o*) although in other cases of cross actions the lien of the attorney must be first satisfied. But still the attorney's lien on the costs of the action are subject to a set-off of interlocutory costs in the same action. (*p*)

(*o*) *Ellis* v. *Bates*, 2 Cr. & M. 143; *George* v. *Elston and others*, 1 Bing. N.C. 513. But costs in equity cannot be set off against those of a rule at law, *Wenham* v. *Fowle*, 2 Dowl. 444.

(*p*) *Eades* v. *Everatt*, 3 Dowl. 687.



CHAPTER XVIII.

THE PRINCIPAL PROCEEDINGS BY A DEFENDANT BETWEEN DECLARATION AND PLEA.

CHAP. XVIII. I. TAKING DECLARATION OUT OF OFFICE.

Of the adoption of one of the several *occasional proceedings* between declaration and plea.

HAVING in the last chapter examined the subjects of *Irregularities* and *Nullities*, and endeavoured to explain the modes of objecting to them, and of sustaining other applications by *Affidavits*, *Summons* and *Orders*, *Motions* and *Rules Nisi*, afterwards made *Absolute*, enforced by *Attachments*; we will now consider the principal *Occasional Proceedings between* declaration and plea, chiefly on the part of a defendant, and which are usually adopted *before he resolves* whether he will *submit* to the action by compromise or suffering judgment by default, or giving a cognovit or warrant of attorney, or whether he will *defend* the action by *pleading* or *demurring*, and either *argue an issue of law* before the Court or *try an issue in fact*

CHAP. XVIII. I. TAKING DECLARATION OUT OF OFFICE

before a jury. The principal of these occasional proceedings will be found enumerated in the above analytical table, and the *most recent rules* and *decisions* applicable to each will be stated under the subdivisions.

Consideration whether the application shall be by summons or by motion.

After having resolved to adopt one or more of these intermediate proceedings, the *next question* relates to the *mode of application;* i. e. whether it shall be by *summons* returnable before a *judge* at chambers and to be decided upon by his *order*, or whether it shall be by *petition*, or by *affidavit* and *motion* to the *Court in banc* for a rule nisi, afterwards to be made absolute, and whether to the Practice Court or to the Court in banc. The general application of these have been considered in the previous chapter; but their practical application to occasional proceedings may be farther examined in this.

Expediency of praying an intermediate *stay of proceedings* pending any application.

For fear that the proceeding should not succeed, and that when decided, the defendant's time for pleading or rejoining, &c. should have elapsed, whereby he might lose the opportunity of trying the merits, it is in general essential for the defendant to endeavour to have his summons or rule nisi relating to any subject drawn up *with a stay of proceedings at all events until the particular application* has been disposed of, and, if possible, until the expiration of as many days, *or as much time* after that event as the party applying had at the time of his application. The cases when or not a stay of proceedings can be obtained have already been fully considered.(*a*)

I. Of taking the declaration when filed out of the office.

I. TAKING DECLARATION OUT OF OFFICE.—Supposing that after the plaintiff has declared there has not been any irregularity in his proceedings that can still be objected to, or that the defendant resolves not to take advantage thereof, then if the declaration has been *filed*, and notice thereof given, the *first proceeding* on the part of a defendant seems to be his taking the declaration so filed out of the office. This act, and the payment for the same, is indispensable before the defendant can plead; (*b*) and if the defendant plead without having done so, the plaintiff may treat the plea as a nullity and sign judgment by default, as for want of a plea, without even demanding a plea. (*c*) On the other hand it must be kept in view, that by taking the declaration out of the office when filed, the defendant waives all objections to the affidavit and process, (*d*)

(*a*) *Ante*, 531 to 533, 557, 558, 582.

(*b*) *White* v. *Dent*, 1 Bos. & Pul. 341; *Keeling* v. *Newton*, 1 Wils. 173; *Bond* v. *Smart*, 1 Chitty's R. 735.

(*c*) *Bond* v. *Smart*, 1 Chitty's R. 476, 566.

(*d*) *Caswall* v. *Martin*, 2 Stra. 1072.

and to any variance between the notice of declaration and the declaration itself; (*e*) and also to the declaration having been filed conditionally instead of absolutely. However the defendant's attorney is usually allowed at the office where it has been filed, to see the exterior of the declaration, and consequently the indorsements. (*f*) And we have seen that neither that act, nor his having ascertained from the officer its contents, waives the right to object to the irregularity. (*g*)

II. Of obtaining particulars of plaintiff's demand. (*h*)

II. OF PARTICULARS OF DEMAND.—Whether a declaration has been delivered or filed, the most usual proceeding on the part of the defendant, is to endeavour to ascertain with *more certainty* the exact extent of the aggregate claim, as also the items with dates of the plaintiff's demand, and for that purpose the defendant may, using the technical terms, "*take out a summons for the particulars of the plaintiff's demand*;" or he may "*crave oyer of any deed*" declared upon, and of which *profert* has *necessarily* been made in the declaration; or he may apply for and obtain in certain cases "*inspection*" of a public or private document.

At what *time* particulars may be applied for,

A defendant may now in all the Courts take out a summons for and obtain *particulars* of the plaintiff's demand *immediately after he has been served with process or arrested, and before appearance*, and this without any affidavit of his ignorance of the nature of the plaintiff's demand, although in the Exchequer such affidavit was formerly indispensable; indeed it seems reasonable, when the writ is so general, as is now always the case under the uniformity of process act, 2 W. 4, c. 39, that the defendant should, at the earliest stage, have the means of ascertaining the exact claim, so as to satisfy the same without incurring further costs, if he find he have no defence, or plead to and defend the claim when disputed. (*i*) There is, however, a modern rule in K. B., that no order be made in any action depending in that Court to compel the delivery of particulars of the plaintiff's demand, unless the defendant, in the event of pleading, *do by such order undertake to plead issuably*, or the plaintiff's attorney, by

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So, when pleas were filed, it was held that taking a plea out of the office and keeping it, waived an objection that it was pleaded in name of a fresh attorney, without a previous order to change. *Margerem* v. *Mekilwaine*, 2 New Rep. 508; *ante*, 520.

(*e*) *Robins* v. *Richards*, 1 Dowl. 378.

(*f*) *Gilbert* v. *Kirkland*, 1 Dowl. 153, and *Robins* v. *Richards*, *id.* 379; *ante*, 440.

(*g*) *Id. ibid.*; *ante*, 440.

(*h*) See in general Tidd, 9th ed. 596 to 601; 2 Arch. K. B. 4th ed. 875 to 882; 2 Arch. C. P. [47, 48, 69, 99,] 224.

(*i*) Reg. Gen. Hil. T. 2 W. 4, c. 47; Jervis's Rules, 54, note (*w*); Dax, Prac. 59; *Derry* v. *Lloyd*, 1 Chitty's R. 724; Reg. Trin. T. 2 G. 4, C. P.; 6 Moore, 211.

CHAP. XVIII. II. PARTICULARS OF DEMAND.

special indorsement, consent to waive the same; (*k*) and it is usual in K. B., upon granting an order, to require from the defendant some admission, as the signature to a note, &c. (*l*) It would seem, therefore, inexpedient, at least in K. B., for a defendant to apply for particulars, unless it be certain that he will be advised to plead issuably, and not in abatement, nor object to be subjected to any reasonable terms. Although the application for particulars should properly be made before pleading, yet a defendant may, under circumstances, apply for and obtain them even after issue joined. (*m*)

Origin of practice of ordering particulars.

The practice of requiring such particulars is comparatively of modern date, and probably attributable to the adoption of *general indebitatus* and quantum meruit counts, also comparatively of modern date, and not to be found in the ancient entries, as we find that declarations for even most ordinary services and works were formerly special. (*n*) It is observable that common counts, as for goods sold, or for work and materials found, may and frequently do embrace numerous transactions that took place at different times and upon different contracts, wholly independant of each other, and of which the form of the declaration affords the defendant in effect no information. It has therefore, since the introduction of those counts, and principally to prevent inconvenience and surprise from them, been the practice, at the instance of a defendant upon a summons, for one of the learned judges, as a matter of course, to order the plaintiff to deliver to the defendant *particulars* of his claim.

Reg. Gen. Trin. T. 1 W. 4, particulars when to accompany declaration, and be annexed to the record.

However, before the Reg. Gen. Trin. T. 1 W. 4, the plaintiff was not required in any case to deliver any particulars until the defendant had obtained *an order* for that purpose. But that rule ordered, " that *with every declaration, if delivered*, or with the *notice* of declaration, if filed, containing " counts in *indebitatus assumpsit*, or *debt on simple* contract, " the plaintiff shall deliver *full particulars* of his demand under " those counts, where such particulars can be comprised within " *three folios*; and where the same cannot be comprised within " three folios, he shall deliver such *a statement* of the nature of " his claim, and the amount of the sum or balance which he " claims to be due, as may be comprised within that number of

(*k*) Reg. Hil. T. 59 Geo. 3, K. B.; Tidd, 597.

(*l*) Tidd, 597.

(*m*) Impey, K. B. 239.

(*n*) *Osborne* v. *Rogers*, 1 Saund. 264. Lord Holt observed, that he was a bold man who first adopted such common counts, 2 Stra. 933; 1 Saund. 269 a, note 2.

" folios. (o) And to secure the delivery of particulars in all " such cases, it is further ordered, that if any declaration or " notice shall be delivered without such particulars or such " statement as aforesaid, and a judge shall afterwards order a " delivery of particulars, the plaintiff shall not be allowed *any* " *costs* in respect of any summons, for the purpose of obtaining " such order, or of the particulars he may afterwards deliver. " . . . And that a *copy* of the particulars of the demand, and " also particulars (if any) of the defendant's set-off, shall be " *annexed* by the plaintiff's attorney to *every record at the* " *time it is entered with the judge's marshal.*" This rule is calculated to induce a plaintiff strictly to comply with its directions, because by delivering the particulars with the declaration or notice, the expense or fee of preparing such particulars would be costs in the cause, to be paid to the plaintiff, if he succeed; but if in violation of the rule no particulars be delivered, and the defendant afterwards obtain a summons and order for particulars, then the plaintiff will not be paid at any time the expenses of preparing the same. And as respects the direction that a copy of the particulars be annexed to the record of nisi prius, the omission would constitute an irregularity, and the judge might refuse to try the cause, or at least to receive evidence in support of the indebitatus counts; whereas it has been held, that when the particulars have been so appended to the record, they are thereby so far authenticated, that the delivery of them need not be proved on the trial, and thus the plaintiff saves some risk in evidence. (p)

Consequence of not delivering them that plaintiff shall not be allowed any costs of a *subsequent* summons and order for a delivery of particulars.

Copy of particulars of demand or of set-off to be annexed to the record.

It will be observed, however, that this rule only applies when a declaration contains an indebitatus count in *assumpsit or debt*, and there are *many other* claims in which it may be still necessary or advisable, *by summons* and order, to obtain full particulars. A judge *may* certainly order particulars in every description of action when justice requires, as in an action of assumpsit against a vendor for not making out a sufficient title to the property sold, a particular of the *objections to the title* may be ordered. (q) And in ejectment for a forfeiture, a particular of the *covenants broken and of the breaches*, may also be ordered; (r) and as the object of obtaining them is not merely to ascertain the extent of the claim and *pay* it, but also to *plead*

When an order for particulars may be obtained.

(o) *Semble*, that the first part of this rule would render a noncompliance with its directions an irregularity and ground for setting aside the delivery of the declaration or notice thereof, without the prescribed particulars.

(p) *Macarty* v. *Smith*, 8 Bing. 145; 1 M. & Scott, 227; 1 Dowl. 253, S. C.

(q) 3 Bos. & P. 46; 1 Campb. 293.

(r) 6 T. R. 597; 7 T. R. 332.

with precision to each part of the claim, and to be *prepared with proper evidence* on the trial, to meet every part of the plaintiff's case, it would seem just to compel the plaintiff, in all cases, to specify each item of his claim, whatever may be the form of declaration. However, in a late case of an action of covenant against an author for *not improving* according to express covenant, to the best of his skill, five works, consisting of several thousand pages, and for publishing three other works containing several thousand pages pretended to be piracies and imitations of parts of the first-named works, a learned judge refused an order for particulars, naming the pages or parts of each work on which the plaintiff intended to rely, though it was urged that it would otherwise be impracticable for the defendant or his attorney, or counsel on the trial, to be prepared for a just defence, because the plaintiff might suddenly, on the trial, select one of the many thousand pages as a breach of the covenant. (*s*)

Where a particular of demand, stating dates and items fully, exceeded three folios, and the plaintiff gave notice to the defendant accordingly under the above Reg. Gen. Trin. T. 1 W. 4, the Court ordered a full particular to be delivered to the *defendant on payment of costs* and taking short notice of trial, if necessary, though he had had full particulars before the action was brought. (*t*) And in another case, where particulars of demand had been delivered under a judge's order, and another differing bill of particulars was afterwards annexed to the record by the plaintiff's attorney, as in pursuance of Reg. Gen. Trin. T. 1 W. 4, and as a copy of the particulars of demand, but in fact containing items not originally stated in the particulars delivered to the defendant; and the plaintiff's evidence at the trial was confined to the items exclusively set forth in the particular annexed to the record, and therefore the defendant's counsel not being prepared to prove the delivery of the particulars to the defendant's attorney under the judge's order, did not then apply for a nonsuit, the Court afterwards granted a new trial without costs, but refused to enter a nonsuit. (*u*)

Requisites of particulars of plaintiff's demand. (*x*)

It is advisable for the plaintiff's attorney, at the time he instructs counsel or a pleader to prepare the declaration, also to draw the *particulars* of the plaintiff's demand; and although

(*s*) *Brooke* v. *Chitty*, C. P. January, A. D. 1835, coram Bosanquet, J. The learned judge stated that the defendant must be supposed to know whether and in what respects he had omitted any improvements, or had been guilty of piracy, and therefore thought the general breach sufficient.

(*t*) *James, Gent.* v. *Child*, 2 Tyr. 302; 2 Cromp. & J. 252, S. C.

(*u*) *Morgan* v. *Harris*, 2 Tyr. 385; 2 Cromp. & J. 461, S. C.

(*x*) See Tidd, 9th ed. 596 to 601; 2 Arch. K. B. 4th ed. 675 to 682; 2 Arch. C. P. 226.

the latter is a mere practical form, and could not, if defective, in any case be *demurred* to, yet great care is essential in *accurately stating the nature of the claim as it will certainly be proved in evidence*, and sometimes even greater care is required in framing particulars than in drawing a declaration; and it may be still advisable to describe the claim in varying statements similar to several counts, when they were permitted. Thus, where the particulars stated that the plaintiff's demand was for goods sold and delivered *to the defendant*, (instead of for money received to his use,) the *plaintiff* was not allowed to give evidence of goods sold *by the defendant as agent for the plaintiff*, and that he was debtor to the plaintiff for the proceeds, and yet it could not be doubted the defendant well knew for what claim the plaintiff was proceeding. (*y*) And though the Court gave leave to amend the particulars, and granted a new trial on payment of costs, yet the latter were disastrous. (*y*) And in a very late case, where the declaration was for *goods sold* and on an account stated, without a count for money received to the plaintiff's use, and the particulars delivered with the notice of declaration, were, "*to a beast sold and delivered*," and the evidence was that the defendant told a third person that he owed the plaintiff 13*l*. 10*s*., without saying on what account, it was held that the plaintiff could not recover on the count for goods sold, because the evidence did not establish a debt for *goods sold*, nor on the account stated, because such admission to a *third person* of a debt for a *single* item was not applicable to an account stated, and there was not any count for money had and received. (*z*) But although the particulars of demand vary from the evidence which the plaintiff adduces in some respects, yet if the defendant appeared at the trial and defended, and was *not really misled*, the variance will be no ground of nonsuit. (*a*)

If the defendant find the particulars defective, as too indistinct, he may on summons obtain an order for *better particulars*, stating dates, &c. on his praying for the same. And in an action on an attorney's bill, the defendant would only have to pay the cost of fair copying such particulars, it being the duty of an attorney to keep a detailed account of the business transacted for his client. (*b*)

(*y*) *Holland* v. *Hopkins*, 2 Bos. & Pul. 243; 3 Esp. 168, S. C.

(*z*) *Breckon* v. *Smith*, 1 Adol. & El. 488. *Semble*, that case turned upon there being no applicable count in the declaration. See *Spencer* v. *Bates*, 1 Gale, 108.

(*a*) *Spencer* v. *Bates*, 1 Gale, 108; *Green* v. *Clark*, 2 Dowl. 18; 2 Taunt. 224; 1 Camp. 69; 3 Maule & Sel. 380.

(*b*) *Jones* v. *Roberts*, 4 Tyr. 310, but not put on that ground.

CHAP. XVIII. II. PARTICULARS OF DEMAND.

Forms of particulars of plaintiff's demand.

The *form* of *particulars*, whether to *accompany* the declaration or notice thereof, in pursuance of the above Reg. Gen. Trin. T. 1 W. 4, r. 6, or to be *delivered* in pursuance of a *judge's order*, must necessarily vary according to the facts of each case; the forms in the note may assist. (*c*) The claim

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(*c*) In the King's Bench [*or* " Common Pleas," *or* " Exchequer of Pleas."]

Between { A. B. Plaintiff, and C. D. Defendant.

The full particulars of the plaintiff's demand under the counts in indebitatus assumpsit in the declaration in this cause are as follows, viz. for

Butcher's meat sold and delivered by the plaintiff to the defendant [*or for*]

Clothes sold and delivered, and tailor's materials found and provided by plaintiff or defendant [*or for*]

Making dresses and other articles of dress for the wife of the defendant and others at his request.

And the *items* of such demand are as follows:

		s.	d.
A. D. 1835, Jan. 1,	beef 9½ lb. at 8*d*.	7	4
3,	leg of mutton, 11 lb. at 7¾ .	8	1¼
	&c. &c.		

[*Here copy the whole bill when the same with the above words will not exceed three folios, (or three times seventy-two words, which constitute a law folio,) and which may be copied in two columns.*]

Dated this —— day of —— A. D. 1835.

Yours, &c.
To Mr. J. K. Defendant's Attorney, [*or* " to the defendant."]
G. H.
10, Clifford's Inn.
Plaintiff's Attorney.

In the King's Bench [*or* " Common Pleas," *or* " Exchequer of Pleas."]

Between { A. B. Plaintiff, and C. D. Defendant.

This action is brought to recover £40, being [*the balance*] due to the plaintiff upon the following items of account.

		£	s.
1835, June 24.	To half year's rent to this day of house and premises situate, &c.	25	10
Sept. 12.	To ten sacks of corn at 10*s*. .	5	0 &c. &c.

Above are the full particulars of the plaintiff's demand, pursuant to the rule of Court in such case made and provided. Dated the —— day of —— 1835.

Yours, &c.
To Mr. D. A. Defendant's Attorney, [*or* " Agent."]
P. A. Plaintiff's Attorney, [*or* " Agent."]

Particulars of demand in action on a surety bond.

In the ——.

Between { A. B. Plaintiff, and C. D. Defendant.

This action is brought by the above plaintiff against the above named defendant, as the surety for E. F. of, &c. agent, for the recovery of damages sustained by the plaintiffs in consequence of the breaches of the condition of the bond or writing obligatory mentioned and set forth in the declaration in this cause.

The breaches of the condition of this bond are,

First, That the said E. F. did not from time to time, on the first day of each and every month, during the time he continued in their service, transmit to the plaintiffs a full and correct statement in writing of all goods and merchandize which came to his hands as agent for the plaintiffs.

Secondly, &c. [*here six distinct breaches were stated.*]

should be described in the particulars *in every possible shape* that could be admissible under the counts in the declaration; as for instance, *first*, the claim might be for £—— for a suit of clothes, as *sold and delivered to the defendant himself*; *secondly*, for the like sum as due for clothes as sold to the defendant, and delivered to *a third person* at his request; *thirdly*, for the sum of £——, as the price or value of such clothes received by the defendant for the use of the plaintiff; and, *fourthly*, for the like sum as due upon an account stated by and between the defendant and the plaintiff.

It has been held at nisi prius that the plaintiff ought to give credit for all the sums paid; (*d*) but that decision, if tenable, is not observed in practice, and the best course is to state that the plaintiff proceeds for a named sum, being the real just balance, thus impliedly but not expressly admitting any payment on account, or at least without specifying in particular any items for monies paid on account, and always avoiding the admission of any set-off. However, in order to take from a defendant any necessity for a plea of payment of part of the plaintiff's demand, it may, as we have seen, be advisable expressly to confine the declaration and particulars to the just balance proceeded for, and that is the modern practice. (*e*) Particulars of demand should also be so framed that the opponent cannot read them in evidence for himself, without a proper accompanying qualification or circumstance against himself, corresponding with the fact; as for instance, when an item for money lent, &c. is stated in particulars, if at the time of the loan the defendant admitted he owed a named balance, then immediately after such item the plaintiff might in his particulars properly add "At the same time the defendant admitted that besides "that item he owed the plaintiff the sum of £——."

Consequences of plaintiff's not complying with order for particulars.

Where the plaintiff refused to deliver particulars, the Court

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The plaintiffs estimate these damages to the full amount of the penalty of the bond of 700*l*., which they seek to recover in this action. Dated this —— day of ——, 1835.

To Mr. ——, Defendant's Attorney or Agent.

Yours, &c. Plaintiff's Agent.

(*d*) *Adlington* v. *Appleton*, 2 Campb. 410. The propriety of that decision was immediately after it was pronounced doubted. There is not in a Court of law any reciprocity in candour, and why should a *plaintiff* be compelled to admit *payments* on account, when a *defendant* is not compellable to admit *receipts* or loans, &c.

(*e*) *Ante*, vol. iii. 472; Bosanquet on Rules of Pleading, page 51, note 48; see *forms*, *id*. 85 to 88; and 2 Chitty on Pleading, 6th edit, in notes.

CHAP. XVIII. II. PARTICULARS OF DEMAND.

of King's Bench refused the defendant permission to sign judgment of non pros. (*f*) It is, however, now the practice to obtain a further order to deliver particulars within a named time, and expressly reserving liberty to defendant to sign judgment of non pros, if the order be not complied with, (*g*) and a form of entering the judgment of non pros in such a case has been given; (*h*) and at least the plaintiff himself must take care to avoid the consequences of the action being out of Court, if he do not declare within a year. (*i*)

Prescribed time of pleading after particulars delivered.

The general rule of Hil. T. 2 W. 4, reg. 48, orders that a defendant shall be allowed the same time for pleading after the delivery of particulars under a judge's order, which he had at the return of the summons; nevertheless judgment shall not be signed till the *afternoon* of the day after the delivery of the particulars, unless otherwise ordered by the judge. (*k*)

III. Of demanding oyer of a deed, &c. declared on. (*l*)

III. OF DEMANDING OYER.—When the plaintiff's declaration, or any subsequent pleading, *necessarily* makes *profert* of a *deed*, the defendant may, before the time for pleading has expired, but not afterwards, *demand or crave oyer thereof*, and thereupon he will be entitled to have a copy of the *whole* deed and of the *attestations* and *names of witnesses* brought to and *delivered to him*, he paying for the same fourpence per sheet, of seventy-two words each. But if a bond be declared on, and profert thereof made, and the condition refer to *other* articles or an indenture, the defendant cannot demand oyer of the latter, but must, if an inspection be essential, make a distinct and special application for a copy of the same; nor has the defendant any right to see or read the original of such last mentioned deed. (*m*) Such inspection can only be obtained by summons or motion. (*n*) The *demand* of oyer is to be in the form in the note. (*o*) There

(*f*) *Burgess* v. *Swayne*, 7 Bar. & Cres. 485; *Somers* v. *King*, 7 Dowl. & Ryl. 125; *Sutton* v. *Clark*, 8 Bing. 165; 1 M. & Scott, 271; 1 Dowl. 259.

(*g*) 2 Arch. K. B. 4th ed. 877.

(*h*) T. Chitty's Forms, 2d edit. 691.

(*i*) *Ante*, 445.

(*k*) See construction in *Tate* v. *Bodfield*, 3 Dowl. 218.

(*l*) See in general Tidd, 9th ed. 586; 2 Arch. K. B. 4th ed. 866.

(*m*) See the whole practice Tidd, 9th ed. 586; 2 Arch. K. B. 4th ed. 866.

(*n*) 2 Arch. K. B. 4th ed. 866.

(*o*) In the King's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."]

Between { A. B. Plaintiff, and C. D. Defendant.

The defendant demands oyer and copy of the writing obligatory mentioned in the declaration in this cause and the condition thereof [*or* "of the indenture," "articles

is no *express* alteration in the previous practice as to oyer, excepting that Reg. Gen. Hil. T. 2 W. 4, reg. 44, orders that "If a defendant, after craving oyer of a deed, omit to insert it "at the head of his plea, the plaintiff, on making up the issue "or demurrer book, may if he think fit insert it for him; but "the costs of such insertion shall be in the discretion of the "taxing officer." This rule assimilated the practice in this respect of the Common Pleas to that of the King's Bench. (*p*) It would be desirable if there were a rule enabling a defendant to set out on oyer only so much of the document as may be deemed essential to his plea, leaving the plaintiff to set out the rest, if important, in his replication or subsequent pleading. In an action on a deed, in which a profert will be necessary, or on any instrument of which an inspection may be ordered, it is advisable for the plaintiff's attorney, in order to avoid delay in the first instance, or at least at the time of declaring, to send the original to London, ready to be produced, in case of demand of oyer, for inspection, for otherwise delay may arise in sending for such original.

CHAP. XVIII. III. DEMANDING OYER.

IV. INSPECTION, &c.—There are also other cases in which, although the declaration has not made profert of a deed, and therefore the defendant could not *demand oyer*, yet the declaration having referred to, or at least being founded upon or connected with a *written instrument*, which it may be material for the defendant to inspect and have a copy of before he pleads, he may, at this stage of the action, obtain the same upon *summons*, in case a previous application should not have been complied with. (*r*) The practice upon this subject, as well as upon *the production of public documents*, as for instance Court Rolls, &c. has already been stated with admirable perspicuity. (*s*) There has not been any recent rule altering the practice there stated, excepting Reg. Gen. Hil. T. 2 W. 4,

IV. Inspecting of other private and public documents. (*q*)

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of agreement," "charter-party," *or* "deed poll,"] mentioned in the declaration in this cause. Dated this —— day of —— A. D. 1835.

Yours, &c.
G. H. Defendant's Attorney,
[*or* "Agent."]

To Mr. E. F. Plaintiff's Attorney [*or* "Agent."]

(*p*) Tidd, 589.
(*q*) See in general Tidd, 9th ed. 586, 589; 2 Arch. K. B. 4th ed. 870 to 875; 2 Arch. C. P. [46, 90,] 222, 223.
(*r*) *Id. ibid.*; see proceedings by a *plaintiff* in order to obtain inspection and copy of written document to declare on, *ante*, 433 to 436.
(*s*) Tidd, 9th ed. 586 to 589.

CHAP. XVIII. IV. INSPECTING DOCUMENTS, &c.

r. 102, which orders that "An order upon the lord of a manor "to allow the usual limited *inspection* of the Court rolls on the "application of a copyhold tenant, may be *absolute in the first* "*instance*, upon an affidavit that the copyhold tenant has ap- "plied for and been refused inspection," which rule assimilates the practice of the Common Pleas to that of the King's Bench. (*t*) But that rule only applies when an action is depending, and not to an ex parte application; and if an application to inspect the Court rolls of a manor is made when no action is pending, then the rule must be nisi only in the first instance. (*u*) And according to a recent decision, unless the party applying for an inspection of parish books allege that he is interested therein, no inspection will be afforded; (*x*) and there is a general distinction between the jurisdiction and practice of Courts of law and Courts of equity, that as regards *private* documents a party has no right to come into a Court of *law* as into a Court of equity, with any motion or proceeding equivalent to or in the nature of a bill of discovery. (*y*) In a recent case, however, in the Practice Court of the King's Bench, an application was made absolute against an attorney even before writ for the production of an agreement for a lease prepared by the brother of the attorney, who was deceased, as well for the applicant, a landlord, as for the tenant. (*z*)

V. Proceedings under *inter-pleader act*, and applications to Court of Law under *inter-pleader act*, or by sheriff at *common law*.

V. OF BILLS OF INTERPLEADER *in equity*, and *motions* on *interpleader act*, 1 & 2. W. 4, c. 58. If, when a defendant has ascertained from the declaration, or particulars of demand, or otherwise, the nature of the plaintiff's claim, he find that he (the defendant) being an agent or stakeholder, and that some *third* person claims an interest, and might hereafter sue him with effect or at least with risk for the same subject-matter of demand, then it may be *necessary* either to file a bill of interpleader *in equity*, (*a*) or to apply to the *Court of law* in which the action is depending, in the manner authorized by the 1 & 2 W. 4, c. 58. (*b*) We have seen that that enactment (*c*) contains two very different provisions, giving distinct jurisdiction, *first*, in relief of *stakeholders, agents, and persons sued in certain*

(*t*) Tidd, 594; Jervis's Rules, 70, note (*z*).

(*u*) *Ex parte Best*, 3 Dowl. 38.

(*x*) *Burrell* v. *Nicholson*, 3 Bar. & Adol. 649.

(*y*) Per Littledale, J., in *Johnson* v. *Brazier*, 1 Adol. & El. 626.

(*z*) *Ex parte Bretter*, 1 Harr. & Wol. 212; and see *Doe* v. *Slight*, 1 Dowl. 163.

(*a*) In equity, *ante*, vol. ii. 417 to 420.

(*b*) At *law*, *ante*, vol. ii. 341 to 347.

(*c*) See the act stated and some decisions, *ante*, vol. ii. 341 to 347.

actions, and as it would seem either relating to goods or ordinary money claims, from *double* liability; and, *secondly*, in further and *more extensive* relief of *sheriffs* and other *officers* endangered in the execution of process. Before that act, *third* persons sued for goods or a debt by one claimant, and also threatened, or in danger of another action by another person, must have resorted to a Court of Equity; and although *sheriffs* might be relieved on motion, yet their remedy before the statute was imperfect; and although a sheriff could obtain time to return a writ, yet he could not in general obtain the costs of applying to the Court. (*d*) We have in a prior page in part considered the enactments in this statute and some of the decisions thereon, and the reader's reference to that part of the work is requested. (*e*) Other decisions have been collected in the recent editions of the principal works on practice. (*f*) But since the observation in the prior part of this work and the publication of any work on practice, there have been numerous decisions, and which we will now collect. These show how extensive and important the operation of this act is in practice by saving the much greater expense of a suit in equity in many cases, though the statute is still but of comparatively *limited* operation.

CHAP. XVIII. V. INTERPLEADER ACT.

Substance of enactment in *first* section.

It will be observed that the recital in the *first* section states the absence of relief at law to *third* persons in general, and discloses the limited intent of the enactment, and *only extends to certain named actions*, probably intended only to include ordinary claims for *money* and *debts* and *goods*, viz. *assumpsit*, *debt*, *detinue*, and *trover*, and *not extending* to an action of *covenant*, *replevin*, or *trespass*, or *ejectment*; and only authorizes an application *after declaration and before plea*; and the *first* section empowers the Court or *any single judge, even at chambers*, to interfere on affidavit and motion, or summons, on the defendant bringing the money into Court, or submitting to the disposal of the goods as directed by the Court; and if the claim is still disputed the Court is to direct the trial of a *feigned issue* to be tried between and at the expense of the actual claimants, and to order the *payment of costs* as may be just and reasonable.

Application un-

A party may apply for relief under the *first* section, although

(*d*) See observation on defects in prior law, Wordsworth's Rules, 68, 69; *Rex* v. *Cocke*, 1 M'Clel. & Young, 198; Tidd, 1000, 1017.

(*e*) *Ante*, vol. ii. 341 to 347.

(*f*) Tidd's Supp. A.D. 1833, 128 to 131; 2 Arch. K. B. 4th ed. 855 to 861; 2 Arch. C. P. [74, 113, 116.]

CHAP. XVIII. V. INTERPLEADER ACT.

der *first* section, 1 & 2 W. 4, c. 58.

he claims *a lien* on the goods against all parties; (*g*) and an auctioneer or agent employed by one party, and who has sold goods, and then has an action brought against him by his employers for the proceeds in one Court, and by a third person also for the proceeds in another Court, must apply after declaration for rules in both the Courts; and although he has advanced money to his employer on account before the adverse claim had been made, he must in his action pay into Court either the whole proceeds or so much as the Court may direct, but still subject to the final order of the Court. (*h*)

It seems that under the *first section* the application for relief may be either to a *single judge* at chambers or to the Court in banc; (*i*) but under the *sixth* section, in relief of *sheriffs* and officers, the application *must* be to the latter. (*k*) The first section is confined to the *particular actions* specified, and there is no direct jurisdiction in ejectment; (*l*) and an application under the same section cannot be made *before* declaration, though the sheriff, under the *sixth* section, may apply to the Court before any action or proceeding has been commenced. (*m*) A stakeholder acting with good faith is entitled, under the first section, as in Courts of Equity, to his *costs* of coming to the Court, out of the fund in dispute, and which are ultimately to be paid by the unsuccessful party. (*n*) The *first* section expressly directs that the application shall be on *affidavit*, or otherwise showing that the defendant in the action does not claim any interest in the subject-matter of the suit, but that the right thereto is *claimed* or *supposed* to belong to some third party who has sued or *is expected* to sue for the same; and that the defendant *does not collude* with such third party, but is ready to bring into Court, or to pay or dispose of the subject-matter of the action as the Court or a judge may order or direct; and thereupon the Court or judge is to make a rule or order to show cause. (*o*)

Claims of *third* persons under an *execution*, and to which the *sixth* section more particularly applies, do not arise at so

(*g*) *Cotter* v. *Bank of England*, 3 M. & Scott, 180; 2 Dowl. 728, S. C.

(*h*) *Allen* v. *Gilby*, 3 Dowl. 143.

(*i*) *Ante*, vol. iii. 28; *Smith* v. *Wheeler*, 3 Dowl. 431; *Shaw* v. *Roberts*, *id.* 25.

(*k*) *Id. ibid.*; *Brackenbury* v. *Laurie*, 3 Dowl. 180; per Alderson, B. *Cook* v. *Allen*, 2 Dowl. 11; 1 Cr. & M. 542.

(*l*) *Smith* v. *Wheeler*, 1 Gale, 15.

(*m*) Per Patteson, J. in *Green* v. *Brown*, 3 Dowl. 337; *Parker* v. *Linnett*, 2 Dowl. 562.

(*n*) *Parker* v. *Linnett*, 2 Dowl. 562; *Cotter* v. *Bank of England*, 3 M. & Scott, 180; 2 Dowl. 728, S. C.; *Duear* v. *Mackintosh*, 3 M. & Scott, 174; 2 Dowl. 730, S. C.; and see *Ford* v. *Dilly*, 5 Bar. & Adol. 885.

(*o*) See forms of affidavit and proceedings on first section, T. Chitty's Forms, 2 edit. 666, 667.

early a stage in the cause, but not until after judgment, and when a writ of fieri facias, or other execution against property, has been issued; but they may as well be considered here, as we are noticing the first section.

Time of application.

We have seen that under the *first* section a defendant can only apply to the Court in the enumerated actions, and then not until *after* declaration and before plea; but that a sheriff is not thus limited, and he may and ought to apply to the Court in *some* form *at the earliest opportunity*, as soon as he has distinct notice of a claim or other impending liability, even *before any* proceedings. (*p*) In one case it was held that eleven days after the sheriff's knowledge of an expected claim was not too late. (*q*) But in another case neglect to apply to the Court for eight days was holden unreasonable. (*r*) And he should apply at the earliest opportunity, although delay will not always preclude relief. (*s*) Even after an attachment has been obtained against the sheriff for not returning a writ of fi. fa. he may be let in and obtain relief on terms of paying the costs of the attachment. (*t*) If a sheriff receive a notice on 23d January of a claim to goods seized by him under a fi. fa. he will not be entitled to relief under the interpleader act, unless he come to the Court in the same Hilary Term. (*u*) In another case it was held that if a sheriff, having seized goods under a fi. fa., received notice of an intended fiat against the defendant on 28th December, he will be entitled to relief, if he come to the Court on the second day of the term after the assignees have been appointed, although as long after as the 16th April. (*x*) And indeed there must be a *known claimant* and an *actual claim* before he can apply under *this act;* (*y*) and it is a sheriff's duty, before he applies, to inquire into and examine the probable sufficiency of the claim, for if on the least consideration it would appear unfounded in fact, or illegal in law, then the sheriff would have to pay the costs of a rule; (*z*) yet when the sheriff has any intimation that he is in peril, he may apply *to enlarge the time* to sell under a fieri facias, or enlarge

(*p*) Per Patteson, J. in *Green* v. *Brown*, 3 Dowl. 337; and *Parker* v. *Linnett*, 2 Dowl. 562; and per Williams, J. in *Foote* v. *Dick*, 1 Harr. & Wol. 207; *Ridgway* v. *Fisher*, 1 Harr. & Wol. 191; 3 Dowl. 567.

(*q*) *Skipper* v. *Lane*, 4 M. & Scott, 283; 2 Dowl. 784; but see *Cook* v. *Allen*, 3 Tyrw. 586.

(*r*) *Ridgway* v. *Fisher*, 1 Harr. & Wol. 189.

(*s*) *Dixon* v. *Ensell*, 2 Dowl. 621.

(*t*) *Alemore* v. *Adeane*, 3 Dowl. 498.

(*u*) *Ridgway* v. *Fisher*, 1 Harr. & Wol. 191; 3 Dowl. 567.

(*x*) *Barker* v. *Phipson*, 1 Harr. & Wol. 191; 3 Dowl. 590, S. C.

(*y*) *Bentley* v. *Hook*, 2 Cr. & M. 426; 4 Tyr. 229; *Isaac* v. *Spilsbury*, 3 M. & Scott, 341; 10 Bing. 3; 2 Dowl. 211, S. C.

(*z*) *Bishop* v. *Hinxman*, 2 Dowl. 166.

the time of returning the writ. (*a*) Even when a notice had been given by *some* person, but whose name did not appear, that a fiat in bankruptcy had been issued against the defendant, and that assignees had been chosen, and the assignees appeared to the rule nisi obtained under this act, yet as it did not appear that the assignees authorized such notice, the rule was *discharged with costs,* though the Court said the sheriff might have moved to enlarge the return of the writ, and then when a claim had been actually made he might have renewed his application. (*b*)

The sheriff has a right to apply to the Court, although the plaintiff has abandoned his execution; (*c*) and although the goods taken in execution were at the time in the possession of third persons claiming as trustees for creditors; (*d*) and a sheriff is not bound, when a claim of a third person is made under an execution, to accept an indemnity tendered by the plaintiff, but may insist on applying to the Court. (*e*) When the sheriff has been allowed to withdraw from possession by a rule under the interpleader act, he cannot afterwards, and after he is out of office, be compelled to re-enter. (*f*)

A sheriff, when an adverse claim has been made to goods under an execution, should immediately give notice thereof to the plaintiff in the action before he has been ruled to return the writ, or if he delay, he will have to pay the costs of that rule. (*g*)

When sheriff not relieved.

The Court will not relieve the sheriff if he neglect to inquire into the nature of the claim; and if it turn out that they were obviously unfounded or illegal, he would have to pay the costs of the rule. (*h*) Nor will the Court interfere on behalf of the sheriff when he has seized goods in execution which are already in custody of the law under a landlord's distress. (*i*) The Court will not relieve the sheriff if he have delivered part of the goods seized under a fi. fa. to the claimant, (*k*) or have paid over proceeds of an execution; (*l*) nor if the under-sheriff's partner be concerned as attorney for one of the parties, as for the assignees of a bankrupt who claimed the goods. (*m*) And although, when there is a charge of negligence against

(*a*) *Bentley* v. *Hook*, 2 Cr. & M. 426; *Isaac* v. *Spilsbury*, 3 M. & Scott, 341; 10 Bing. 3; 2 Dowl. 211, S. C.

(*b*) *Bentley* v. *Hook*, 2 Cr. & M. 426.

(*c*) *Baynton* v. *Harvey*, 3 Dowl. 344; *Wells* v. *Hopkins*, *id.* 346.

(*d*) *Allen* v. *Gibbon*, 2 Dowl. 292.

(*e*) *Levy* v. *Champneys*, 2 Dowl. 454.

(*f*) *Wilton* v. *Chambers*, 3 Dowl. 12.

(*g*) *Brain* v. *Hunt*, 2 Cr. & M. 418.

(*h*) *Bishop* v. *Hinxman*, 2 Dowl. 166.

(*i*) *Haythorn* v. *Bush*, 2 Dowl. 641.

(*k*) *Brain* v. *Hunt*, 2 Crom. & M. 418; 2 Dowl. 391.

(*l*) *Chalon* v. *Anderson*, 3 Tyrw. 237; *Cook* v. *Allen*, *id.* 586.

(*m*) *Dudden* v. *Long*, 1 Bing. N. C. 299; 3 Dowl. 139.

the sheriff, the Court will nevertheless interfere to protect him against adverse claims; yet the rule will be so modified, as to leave the parties liberty to sue the sheriff for such negligence.(n) And where assignees of a bankrupt brought trover against the sheriff, and alleged want of care in selling for the best price, and therefore the amount of proceeds was disputed, the Court refused to interfere on the motion of the sheriff.(o)

Affidavit, motion, and proceedings.(p)

The sheriff need not in his *affidavit* in support of the application under the *sixth* section deny collusion with the claimant.(q) Though in a prior case it was doubted whether he should not so swear,(r) as expressly required when an application is made under the *first* section.(s) In general no supplemental affidavit will be allowed; but if the delay can be satisfactorily accounted for, there must be a fresh motion and rule upon a new affidavit.(t)

When third party's claim barred, and he to pay costs.

Where an *execution creditor* does not appear on being served with the sheriff's rule it has been considered that the Court cannot bar his claim; because the power of barring claims is by the act confined to the claims of *third* persons.(u) But where a *third* person claims under an execution, and the sheriff moves under the sixth section, making him a party to the rule, and swears to due service of the rule, then, although he do not appear, the Court may bar his claim; and by the rule absolute compel him to pay the execution creditor's costs of showing cause against the rule,(x) and also the sheriff's costs.(y)

When issue to be directed.

Where application is made by the sheriff for relief under the sixth section the Court will not try the merits of the respective claims upon affidavit; but must, if still contested, direct an issue.(z) And the costs of such issue must in general be paid by the unsuccessful party.(a) It seems, that in an issue under this act, the claimant should be the plaintiff, and the execution creditor the defendant.(b)

When costs payable, and to whom.

If a party distinctly *make* and *continue* a claim upon goods

(n) *Brackenbury* v. *Laurie*, 3 Dowl. 180.

(o) *Gibson* v. *Humphrey*, 3 Tyrwh. 588.

(p) *Donniger* v. *Hinxman*, 2 Dowl. 424; *Dobbins* v. *Green*, 2 Dowl. 509; but see *Cook* v. *Allen*, 3 Tyrw. 586; 2 Dowl. 11.

(q) See forms of affidavit, &c. under sixth section, T. Chitty's Forms, 2d edit. 668 to 671.

(r) *Cook* v. *Allen*, 2 Dowl. 11; 3 Tyrw. 586.

(s) *Ante*, 622; and *ante*, vol. ii. 344.

(t) *Cook* v. *Allen*, 2 Dowl. 11; 3 Tyrw. 586, S. C.

(u) *Donniger* v. *Hinxman*, 2 Dowl. 424.

(x) *Perkins* v. *Benton*, 3 Tyrw. 51; 2 Dowl. 108.

(y) But see *post*, 626.

(z) *Bramridge* v. *Adshead*, 2 Dowl. 59, *Allen* v. *Gibbon*, 2 Dowl. 292.

(a) *Bowen* v. *Bramridge*, 2 Dowl. 212.

(b) *Bently* v. *Hook*, 4 Tyr. 229; 2 Cr. & M. 426, S. C.

taken in execution, he will thereby incur the risk of paying the *costs* of an application to the Court or a judge by the sheriff; and although he do not afterwards appear to a rule obtained by the sheriff, or he neglect to try an issue directed to be tried, yet the Court of Exchequer made absolute the rule for barring his claim, and make him or the defendant in the execution, if he caused the claim to be made, pay the costs of the sheriff's application.(*c*) But in a subsequent case in C. P. that Court would not allow the sheriff applying to be relieved under the interpleader act his costs, where the claimant had given notice not to sell; and per Ch. J. Tindal, "The sheriff is extremely well off in being indemnified at so cheap a rate as he is, and cannot have his costs. The Court of Exchequer have thought one way, but we think another." And the Court also refused the plaintiff in the execution his costs of appearing to the sheriff's rule; and the Court said such costs would not be allowed to such a plaintiff except in case of extremely improper conduct in the opposite party.(*d*) And when an issue is directed by the Court under the sixth section, between the plaintiff in an execution and the claimant, and such plaintiff afterwards abandons all claim, the sheriff may by rule of Court recover from the plaintiff the costs of keeping possession of the goods and sale and of the application; although in the first instance the plaintiff gave no instructions to take the goods.(*e*) And although in a late case the Court of K. B. refused the sheriff the costs of applying to the Court under the interpleader act, yet they allowed him the extra expenses he had been put to by obeying the rule of Court directing an issue.(*f*) But before the sheriff makes a supposed claimant a party to the rule there should be an application to that party to ascertain whether he *persists* in such claim; for otherwise the sheriff may have to pay him his costs of appearing to the rule if he then abandon all claim. (*g*) On the other hand, the Court on such application by the sheriff will, on proper grounds shown, order the sheriff or the execution creditor to pay to a *third* party appearing and successfully prosecuting his claim his costs of such appearance.(*h*) But where

(*c*) *Lewis* v. *Eicke*, 2 Cr. & M. 321; 2 Dowl. 337; *Philby* v. *Ikey*, 2 Dowl. 222; *Ford* v. *Dilly*, 5 Bar. & Adol. 885; and see *Perkins* v. *Burton*, 3 Tyrw. 51; 2 Dowl. 108, S. C.; *Scales* v. *Sargeson*, 3 Dowl. 707.

(*d*) *Oram* v. *Sheldon*, 3 Dowl. 640; and see *Armitage* v. *Foster*, 1 Harr. & Wol. 208, in K. B.

(*e*) *Dabbs* v. *Humphries*, 1 Bing. N. C. 412; 3 Dowl. 377.

(*f*) *Armitage* v. *Foster*, 1 Harr. & Wol. 208.

(*g*) *Bowen* v. *Bramridge*, 2 Dowl. 213; *Philby* v. *Ikey*, 2 Dowl. 222; *Oram* v. *Sheldon*, 1 Hodges, 92.

(*h*) *Ford* v. *Dilly*, 5 Bar. & Adol. 885.

a claimant afterwards informed the execution creditor that he abandoned his claim, and did not intend to appear to the sheriff's rule, it was held that neither the sheriff nor the execution creditor were entititled to costs.(*i*)

Where a landlord has given notice of his claim for rent the sheriff must pay it promptly, or will have to pay the costs of the landlord's appearance to a rule obtained by the sheriff in respect of a claim made by assignees; but where assignees claim, and afterwards the fiat is superseded, the Court refused to make the sheriff pay the costs of the assignees' appearance to the sheriff's rule;(*k*) and although the landlord be ordered to give security for the amount of rent paid to him by the sheriff, yet the latter must pay the costs of such security.(*l*)

VI. Of bills of interpleader in equity.

Although the powers of the *courts of law*, as well at common law as under the sixth section of the interpleader act, in protection of a *sheriff* or other *officers* when executing the process of the Courts, is thus extensive, yet we have seen that the powers of relieving under the *first* section of the act are limited to certain specified actions; and therefore many cases will still arise where, at this stage of an action, if not sooner, it will be necessary to file a bill of interpleader in equity, the practice relating to which has already been considered.(*m*) We have seen that when the claims are merely *equitable* it has been supposed that the act of 1 & 2 W. 4, c. 58, does not apply, though the act is not in terms limited to legal claims.(*n*)

VII. Of filing a bill in equity, praying for an injunction to prevent or restrain an action or proceeding at law.

At this stage of an action, when the declaration has disclosed the particulars of the cause of action, if not before, it is advisable, if there be no legal defence but one merely equitable, to file a *bill* in a Court of equity, and pray and move for an *injunction to stay all proceedings at law*. The practice and proceedings in these cases have already been sufficiently explained or referred to.(*o*)

VIII. Of obtaining a *discovery* of other particulars.

Besides ascertaining the particulars of the plaintiff's claim or demand, it may frequently be desirable, even at this stage of an action, to obtain a *discovery of other facts*, as the residence of the plaintiff, so as to be certain that he will be forthcoming to pay costs,(*p*) or *other facts*, in order to prepare the plea or

(*i*) *Oram* v. *Sheldon*, 1 Hodges, 92; 3 Dowl. 640, S. C.; *ante*, 626, note (*d*).
(*k*) *Clark* v. *Lord*, 2 Dowl. 55, 227.
(*l*) *Clark* v. *Lord*, 2 Dowl. 227.
(*m*) *Ante*, vol. ii. 417, 418.
(*n*) *Ante*, vol. ii. 345, note (*y*).
(*o*) *Ante*, vol. ii. 414 to 417.
(*p*) *Neal* v. *Holder*, 3 Dowl. 493.

CHAP. XVIII. VIII. BILLS OF DISCOVERY.

defence at law, and some of the proceedings enumerated in the analytical table have that tendency; but the only *comprehensive general mode* of obtaining information is still only by filing *a bill in equity for a discovery*, and which in Courts of equity still constitute an important branch of practice. (q) We have touched on this remedy on several occasions, and it would be out of place here fully to examine it. (r) A Court of law will so far recognise the right of a defendant to a discovery, that if it clearly appear that a discovery is necessary to a defence at law, they will give the defendant further time to plead, for the very purpose of enabling him in the meantime to obtain a discovery by a bill in equity. (s) In A. D. 1833 an attempt was made in the House of Lords to introduce a bill, enabling a plaintiff on affidavit that he had a just cause of action, and a defendant on affidavit that he had a good defence on the merits, to exhibit interrogatories before a commissioner upon any fact not tending to criminate the opponent, or subject him to a penalty, or affect any estate or interest the title to which is not in dispute in the cause, and, with some other exceptions, but such bill was not passed; (t) and however advisable, with reference to the saving time and expense, and at present with the exception of the proceedings enumerated in the analytical table, and occasionally some discovery that may be elicited by other occasional rules nisi, a discovery can only be enforced in a Court of equity.

IX. Of staying proceedings at law, on ground of plaintiff's incapacity to sue or ignorance of the proceeding or of the injustice of his suing. (u)

At this stage, if not sooner, an application is to be made to the Court in banc to stay the proceedings, on the ground of the plaintiff's *incapacity* to sue, or the impropriety of his suing; though unless under particular circumstances, the Court will not try the merits at law on affidavits. Thus, if it be shown by affidavit that the plaintiff is not the holder of nor beneficially interested in a bill on which he has brought an action, nor authorized the action, but that another person is the beneficial holder, the Court will in some cases stay the proceedings. (x) So, where a party having been indicted for felony sued his

(q) *Ante*, vol. ii. 50, 54, 419; 1 Mad. Ch. Prac. 196 to 216.

(r) *Ante*, vol. ii. 48 to 52, 54, 55, 348, 349, 419.

(s) *Whitter* v. *Cazalet*, 2 T. R. 683; 2 Arch. K. B. 4th edit. 870. But see *Foreman* v. *Jeyes*, 5 Bar. & Adolp. 835, and *post*,

(t) Lord Wynford's suits at law bill, ordered to be printed 22d of February, 1833, opposed by Lord Eldon and Lord Lyndhurst, and negatived on second reading, without a division, in April, 1833, as tending to destroy the boundaries between courts of law and equity; but certainly containing many desirable enactments.

(u) See in general Tidd, 9th edit. 517 to 539.

(x) *Stone* v. *Butt*, 2 Cr. & M. 416; 2 Dowl. 335; and see Chitty on Bills, 8th edit. 335.

bankers for money deposited with him, which it was sworn was the produce of the felony, the Court of Common Pleas, on application, gave time to plead in a month after the trial of the indictment;(y) so in an action for words imputing murder, the Court gave leave to plead until the next term, upon the ground that the plaintiff was to be tried for the murder in the mean time upon an indictment then pending.(z) And although a Court of law cannot *directly* prevent an exercise of a legal right of action, yet it may control the action when justice requires, as where an action had been commenced in the name of a person having the legal interest, yet if his abuse of the proceeding to the injury of the party beneficially interested be suspected, the Court may stay the proceedings on the defendant's bringing the money into Court, and it will be there impounded until it can be safely paid out, under a subsequent order of the Court. (a) Where a plaintiff deposited a bill of exchange, on which he was suing, in the hands of a third person, and at the same time gave him notice of the action, the Court held, that he did not thereby part with his right of action, and although the third person afterwards brought an action on the same bill, they would not at the instance of the defendant stay the first action.(b)

IX. Staying Proceedings on Plaintiff's Incapacity.

When a statute gives *another* specific remedy not by action, and yet instead of pursuing it, an informer has adopted an action, there is a class of cases in which the Courts will interfere summarily; as if any person, except the attorney-general, or some revenue-officer, were to prosecute an action for a penalty incurred under the laws for the protection of the customs and excise-duties,(d) or stamp-duties,(e) &c. It is obvious that although the objection to the form of proceeding would constitute a complete defence on the trial, yet it is just to stop the proceeding in limine to prevent expense, which, perhaps, the defendant might not be able to recover back from the plaintiff in such untenable proceeding.

X. Staying proceedings in an action on a penal or other statute, not authorising present proceeding. (c)

When an action is prosecuted by an attorney without proper authority, the Court will stay the proceedings, for otherwise

XI. Want of authority to attorney to sue.

(y) *Deakin* v. *Praed*, 4 Taunt. 825; *Sibson* v. *Niven*, Barnes, 224.
(z) *Sibson* v. *Niven*, Barnes, 224; 1 Arch. K. B. 4th edit. 238.
(a) *Jones* v. *Brimwell*, 5 Dowl. 4[illegible]; *Doe* dem. *Baker* v. *Roe*, 3 Dowl. 496.
(b) *Marsh* v. *Newell*, 1 Taunt. 109.
(c) Tidd, 9th edit. 517 to 530.
(d) Tidd, 519.
(e) Tidd, 520.

CHAP. XVIII. XI. Staying Proceedings no Authority to sue.

the defendant might be twice charged. (*f*) So, if an unqualified attorney prosecute an action, the proceedings may, on motion, be stayed till a competent attorney has been appointed, though the proceeding, as a declaration, should be returned, and the same cannot be treated as a mere nullity on account of the incompetency of the attorney. (*g*) There are, however, numerous instances in which the incompetency of a party's attorney to practice *at all* constitutes no ground of motion or application to the Court to stay the proceeding, if he really had authority from the client. (*h*)

XII. Staying proceedings, on ground that no debt is due.

We have seen that it is a general rule that the Courts will not stay the proceedings on affidavits that there is no existing debt, as that it has been paid, unless the plaintiff's affidavit, in answer to the application, do not deny the defendant's allegation; (*i*) but, nevertheless, the Courts have sometimes relaxed this rule, especially where a party has been arrested and is in custody, and has difficulty in obtaining bail, (*i*) or where the plaintiff has in writing admitted that he has no right of action. (*k*) Where the Commissioners of a Court of Request had previously allowed the plaintiff the benefit of his claim by way of set-off to a larger claim of the defendant upon him, the Court of Exchequer expressed their regret that they could not stay the plaintiff's action for the amount of the sum so allowed. (*l*) However, where a larger sum has been indorsed on a writ than was due, by which the defendant was misled, the Court afterwards stayed the proceedings on the payment of the real debt and costs of writ only, provided the defendant applied promptly after the plaintiff's particulars had been delivered. (*m*)

In an action commenced by bailable process, the Court will not stay proceedings until after the trial of an indictment for perjury, founded on the plaintiff's affidavit of debt, (*n*) any more than they will grant a new trial, on the ground that an

(*f*) *Robson* v. *Eaton*, 1 Term Rep. 62; *Buckle* v. *Roach*, 1 Chitty's Rep. 194; and see *Doe* dem. *Baker* v. *Roe*, 3 Dowl. 496; but see *id.* 193 (*b*); Tidd, 93, 529; 2 Arch. 4th edit, 853, 628, 643; uncertificated attorney, Arch. K. B. 4th edit. 27, 853.

(*g*) *Bayley* v. *Thompson*, 2 Dowl. 655; *Hilleary* v. *Hungate*, 3 Dowl. 56; *Constable* v. *Johnson*, 1 Cr. & M. 88; *ante*, vol. ii. 15, 16

(*h*) *Ante*, vol. ii. 15; *Hilleary* v. *Hungate*, 3 Dowl. 56; *Glyn* v. *Hutchinson*, *id.* 529; *Bayley* v. *Thompson*, 2 Dowl. 655.

(*i*) See the cases, *ante*, vol. iii. 369, 370; Tidd, 530, note (*b*); 2 Arch. K. B. 4th edit. 852; *Smith* v. *Curtis*, 2 Dowl. 223; *Tucker* v. *Tucker*, 1 Hodges' Rep. C. P. 15.

(*k*) *Ante*, vol. iii. 370, note (*n*).

(*l*) *Smith* v. *Curtis*, 2 Dowl. 223; *semble*, on ground that the commissioners had no jurisdiction to allow such set-off.

(*m*) *Elliston* v. *Robinson*, 2 Cr. & M. 343; 2 Dowl. 241, S. C.

(*n*) *Johnson* v. *Wardle*, 3 Dowl. 550.

CHAP. XVIII. XII. STAYING PROCEEDINGS NO DEBT.

indictment for perjury has been found against one of the principal witnesses, on whose testimony the verdict was founded, because to grant such application would be an encouragement to motions of that nature, and whenever a party found himself pressed with such an action, the course would be to indict the defendant for perjury, and then move to stay the proceedings.(n) Nor will the Court, on motion, stay proceedings, on the ground that the claim is barred by the statute of limitations, as that it is a matter to be pleaded and tried, (o) and yet we have seen the Courts have interfered as regards arrest and bail in a strong case of that nature.(p)

If an attorney commence an action for his fees and costs, without having delivered his signed bill a month, the Court, on motion, will stay his proceeding. (q) But although a verdict had been found against an attorney, finding that he had been guilty of gross negligence, the Court refused to stay the proceedings in his action for his costs, in the same proceeding to which such negligence was alleged to relate. (r)

The Court will not, at the instance of *a plaintiff*, stay the proceedings in an action on a bill against the acceptor, on the ground that the drawer has paid the debt and costs of action against him, as the acceptor has a right to be paid his costs of defending the action against him. (s)

XIII. Staying proceedings when several and *concurrent* actions *pending* for same cause. (t)

If it be sworn and not denied that there are several pending actions for *precisely* the *same cause*, the Court will put the plaintiff to his election and stay the proceedings on the rest, and not compel the defendant to plead the pendency of the first action in abatement, upon which he would not be entitled to costs; (t) but if the identity be denied, or not very clearly established, the Court will not interfere; (u) and the circumstance of a plaintiff having been non prossed in a prior action of replevin for taking the same goods, will not induce the Court to stay the proceedings in a subsequent action of trespass for taking the same goods, it being considered that such judgment of non pros was not a judgment on the merits. (x)

(n) *Johnson* v. *Wardle*, 3 Dowl. 550.

(o) *Potter* v. *Macdonel*, 3 Dowl. 584; 1 Harr. & Woll. 189, S. C.

(p) *Ante*, 369, 370.

(q) *Semble*, as the 2 Geo. 2, c. 23, s. 23, prohibits any action until a signed bill has been delivered a month; see *Barr* v. *Wiggens*, 1 Clark & Fin. 125; but see 4 Moore, 4; Tidd, 334, that a defendant arrested on an attorney's bill cannot be discharged out of custody, on ground that a signed bill not delivered.

(r) *Smith* v. *Roll*, 2 Dowl. 62.

(s) *Lewis* v. *Dalrymple*, 3 Dowl. 433.

(t) See in general Tidd, 528; 2 Arch. K. B. 4th ed. 848 to 851; *Miles* v. *Bristol*, 3 B. & Adol. 945; *ante*, vol. ii. 349, 350; *Souter* v. *Watts*, 2 Dowl. 263.

(u) *Nicholls* v. *Lefevre*, 3 Dowl. 135.

(x) *Liversedge* v. *Goode*, 2 Dowl. 141.

CHAP. XVIII. XIII. Staying Proceedings, Concurrent Actions.

So where in answer to a motion to stay the proceedings in a second action, the plaintiff disclaimed the act of the attorney in bringing the first action, the Court would not interfere. (y) So if an action or writ of scire facias be brought on a judgment pending a writ of error, the Court will, if the writ of error be not evidently for the mere purpose of delay, upon a prompt application, stay proceedings in such concurrent action or scire facias. (z) But if the defendant delay his application until the plaintiff has obtained a second judgment, the Court will not then stay or set aside an execution thereon. (a)

XIV. Staying proceedings in a second action after a former recovery or defeat.

In some cases, though rarely, the Court will interfere, and *on motion* stay the proceedings in a second action, on the ground that there has been a former *recovery* in favour of the plaintiff, or former verdict and judgment for the defendant for the same cause, and that the second proceeding is harassing and vexatious; but as such former recovery may, if true, be effectually pleaded in bar, the defendant is in general put to *plead* that defence, (b) and which he could not do effectually unless the prior verdict and judgment actually *included* the demand sued for. (c)

XV. When or not proceedings stayed at law in order to render available a defence or relief in a Court of equity.

In a recent case it was considered that a Court of law will not stay proceedings at law in aid of equitable relief to be obtained in the Court of Chancery, (d) nor on ground that a bill is depending in Chancery for the same cause, (e) nor in general on the ground that a criminal proceeding instituted by the party applying is about to be tried. (f) And where the plaintiffs obtained a verdict against the defendant in an action under an award in K. B., and the Court of Chancery, upon bill filed and matter appearing on the award itself, granted an injunction to stay further proceedings, and the plaintiffs nevertheless signed judgment and took defendant in execution, yet the Court of K. B., on application for a rule nisi to discharge the defendant out of custody, refused to interfere, although it was sworn that the plaintiffs kept out of the way to avoid an attachment out of the Court of Chancery; (g) and yet there are cases

(y) *Souter* v. *Watts*, 2 Dowl. 263.
(z) Tidd, 530, 531.
(a) *Robinson* v. *Tuckwell*, Willes, 183; Sir G. Cooke, 159, S. C.
(b) 2 Arch. K. B. 850; *Liversedge* v. *Goode*, 2 Dowl. 141; *Harrington* v. *Johns*, Cowp. 744; *Pechell* v. *Layton*, 2 T. R. 512, 712.
(c) *Hadley* v. *Green*, 2 Tyrw. R. 390.
(d) *Foreman* v. *Jeyes*, 5 Bar. & Adol. 835; but see *ante*, 628.
(e) *Murphy* v. *Cadell*, 2 Bos. & Pul. 137; *Wise* v. *Prowse*, 9 Price, 391.
(f) Tidd, 538, 539.
(g) *Foreman* v. *Jeyes*, 5 Bar. & Adol. 835. The Chancellor, however, on application, ordered the defendant to be discharged.

in which Courts of law have interfered, (*g*) and time to plead has been given at law purposely to enable the defendant in the mean time to file a bill of discovery in Chancery. (*h*)

CHAP. XVIII. XV. STAYING PROCEEDINGS, &c.

XVI. Staying action or proceeding as contrary to agreement or good faith. (*i*)

When an action is *brought* or *proceeded in* contrary to *good faith*, the Court will, debito justitiæ, stay the proceedings; (*i*) as where an action was brought pending a reference, which it was agreed should operate as a stay of proceedings, and yet could not be pleaded as a legal bar, the Court will stay the proceedings. (*k*) But the Court on motion will not discharge a defendant out of custody, or stay proceedings on the ground that the plaintiff caused him to be arrested after the plaintiff had consented in writing to give the defendant time, not elapsed, to pay the debt by instalments, there not appearing any *new* consideration for the plaintiff's agreement to wait. (*l*)

XVII. Staying action, or proceeding on ground of being frivolous or for too small a sum.

If the debt sought to be removed be under forty shillings, and is recoverable in the County Court, or in another inferior Court, (and *no other* mode of objecting to the action in the superior Court, has been enacted, (*m*)) then such superior Court will stay the proceedings on that fact appearing either from the declaration or particulars of demand, or the admission of the plaintiff or his attorney, or otherwise established by affidavit not contradicted. (*n*) But if there would not be an adequate remedy in another Court, the superior Court will not interfere, because a creditor is not to lose a just debt on account of the smallness of the amount; (*o*) and therefore in support of any application of this nature to stay proceedings, the affidavit must show that the plaintiff has a perfect remedy in another Court. (*o*)

XVIII. Staying proceedings until security for costs, plaintiff being *permanently abroad*.

From the great number of reported cases relating to motions to *stay proceedings* until the plaintiff, *when abroad*, has given *security* for costs, it is obvious that this is an important branch of practice, and may be properly here considered, because the

(*g*) *Davis* v. *Saller*, 2 Crom. & J. 466, there cited.

(*h*) 2 T. Rep. 683; 1 Arch. K. B. 238.

(*i*) Tidd, 515, 516, 529, 1134; 2 Arch. 4th. ed. 853; *Cash* v. *Wells*, 1 Bar. & Adol. 375.

(*k*) Tidd, 529; but see *Lowes* v. *Kermode*, 2 Moore, 30.

(*l*) *Udall* v. *Nelson*, 4 Nev. & Man. 637.

(*m*) But if a particular mode of relief, as by plea or suggestion, &c. is prescribed, it should in general be strictly observed. Per Lord Kenyon, in 1 East, 354; and see the statutes, Tidd, 9th ed. 954 to 962.

(*n*) Tidd, 9th ed. 515 to 539; 2 Arch. 4th ed. 851; 1 Chitty on Pleading, 5th ed. 476.

(*o*) *Ante*, vol. i. 28, note (*q*); *Tubb* v. *Woodward*, 6 Term R. 175.

CHAP. XVIII. XVIII. SECURITY FOR COSTS.

application should be made at the earliest opportunity *after* appearance or justification of bail, and before any further proceeding by a defendant.(*p*) But the application should not be made in a bailable action until after the twenty days for excepting to bail have expired. (*q*) A defendant cannot move after he has pleaded, unless his affidavit state that he was not aware of the plaintiff being abroad at the time of pleading. (*r*) It is not however too late after an order for time, provided it be before pleading. (*s*) There is an express rule in Reg. Gen. Hil. T. 2 W. 4, r. 98, that "an application to compel the "plaintiff to give security for costs, must in ordinary cases be "made before issue joined," which settled the previously conflicting practice as respects the time of the application; (*t*) and in no case can the application be after judgment signed. (*u*) But it seems that the affidavit in support of the application need not state the stage of the proceedings, and that if there be any objection on that ground it must be shown in answer. (*x*) In general, if the plaintiff *permanently* reside *abroad*, or in Ireland or Scotland, the defendant must apply for security for costs. (*y*) But not a British mariner only *occasionally* abroad, but having his family resident in England, (*z*) nor a person only temporarily abroad; (*a*) though if it appear that the plaintiff be permanently resident abroad, though he be occasionally in this country, he is bound on application to give this usual security; (*b*) but if a pauper admitted to sue in forma pauperis will be absent from England for eighteen months, the Court will compel him to give security for costs, or stay his proceedings until his return. (*c*) But not if the plaintiff be a peer, though in equity the practice is otherwise. (*d*) And if the plaintiff be an officer actually employed in his majesty's service abroad, he need not give security. (*e*) But if only one of several plaintiffs be in England, although the rest be abroad, then no security for costs will be ordered. (*f*)

(*p*) See in general Tidd, 9th ed. 534 to 538; 2 Arch. K. B. 4th ed. 862 to 866; *Preuve* v. *Biron*, 4 T. R. 697; *Anonymous*, 2 Chit. R. 152; *Carr* v. *Shaw*, 6 T. R. 496.

(*q*) Per Patteson, J. March 22, A. D. 1833, MS.

(*r*) *Brown* v. *Wright*, 1 Dowl. 95; *Duncan* v. *Stint*, 5 Bar. & Ald. 702; 1 Dowl. & R. 348, S. C.

(*s*) *Wilson* v. *Minchin*, 2 Tyr. 166; 2 Cr. & J. 87, S. C.; *Gurney* v. *Key*, 1 Harr. & Wol. 203; 3 Dowl. 559.

(*t*) Tidd, 537; Jervis's Rules, 69, note (*v*).

(*u*) *Bohrs* v. *Sessions*, 2 Dowl. 710.

(*x*) *Jones* v. *Jones*, 2 Crom. & J. 207; 2 Tyr. 216.

(*y*) 2 Arch. K. B. 4th ed. 862.

(*z*) *Ford* v. *Boucher*, 1 Hodges, 58, overruling *Wells* v. *Barton*, 2 Dowl. 160.

(*a*) *Taylor* v. *Fraser*, 2 Dowl. 622.

(*b*) *Gurney* v. *Key*, 3 Dowl. 559.

(*c*) *Foss* v. *Wagner*, 2 Dowl. 499.

(*d*) *Earl Ferrars* v. *Robins*, 2 Dowl. 636; *Lord Aldborough* v. *Burton*, 2 M. & R. 401; 5 Legal Obs. Index, 45.

(*e*) *Lillie* v. *Lillie*, 2 M. & R. 404; *Lord Nugent* v. *Harcourt*, 2 Dowl. 578.

(*f*) *Orr* v. *Bowles*, 1 Hodges, 23; 2 Crom. & J. 88; 2 Tyr. 167, S. C.

CHAP. XVIII.

XVIII. SECURITY FOR COSTS.

And in general a plaintiff will not be required to give security for costs, or to disclose his place of residence, where there is no doubt that he sues in his own right on his private right of action, and it does not appear that he is out of the kingdom.(*g*)

Course of proceeding to obtain security.

Before any application to the Court or a judge, there should be a civil application to the plaintiff's attorney, requiring him voluntarily to give security for costs, if not the applicant will be ordered to pay the costs; (*h*) and unless there has been a previous private application, the Court will not direct a stay of proceedings. (*i*) Nor will the Court permit a stay of proceedings if the motion be delayed till the last day of the term. (*k*) The affidavit should show such previous request and refusal, or no stay of proceedings will be granted; and the affidavit should state that the plaintiff is resident and not merely temporarily abroad; (*l*) and a rule nisi, with a stay of proceedings, cannot be obtained the last day of a term. (*m*) The Court will not make a second order for further or additional security, although the first sureties become insolvent. (*n*)

XIX. Staying proceedings until security for costs when *plaintiff insolvent*. (*o*)

If an insolvent proceed with an action after executing his assignment, although no assignees are appointed, the Court will stay the proceedings until he or some assignee or creditor has given security for costs. (*p*) And if assignees of a bankrupt go on with an action brought by him before he became bankrupt, they must find security for the costs incurred as well before as

(*g*) *Lloyd* v. *Davis*, 1 Tyr. 533.
(*h*) *Bohrs* v. *Session*, 2 Dowl. 710.
(*i*) *Jones* v. *Jones*, 2 Crom. & J. 207; see form of notice and affidavit Tidd's Forms, 180. The form of notice may be thus:

Notice of motion to stay proceedings till security for costs has been given.

In the ——.

Between { A. B. Plaintiff, and C. D. Defendant.

Take notice that this Honourable Court will be moved on —— next, or so soon after as counsel can be heard, for a rule to show cause why all the proceedings in this cause should not be stayed until security be given for the payment of costs. Dated, &c.

To Mr. ——, Plaintiff's Attorney.

Yours, &c. Defendant's Attorney.

(*k*) *Gronow* v. *Pointer*, 3 Dowl. 571.
(*l*) *Taylor* v. *Fraser*, 2 Dowl. 622; *Ford* v. *Boucher*, 1 Hodges, 58; see form of affidavit Tidd's Forms, 180.
(*m*) *Gronow* v. *Pointer*, 3 Dowl. 571.
(*n*) *Aliven* v. *Furnival*, 2 Cr. & M. 555.
(*o*) See in general Tidd, 9th ed. 534, 535; 2 Arch. K. B. 4th ed.
(*p*) *Doyle* v. *Anderson*, 2 Dowl. 596.

CHAP. XVIII. XIX. PLAINTIFF A BANKRUPT, &c.

after the fiat; and when the action was brought in Easter term, and a fiat was issued against the plaintiff on 2d November, and before the next Easter term the assignee gave notice of trial for the sittings after Easter term, the motion for security for costs was allowed late in that term. (q) In general, however, the alleged insolvency of a plaintiff does not afford a ground for compelling him to find security for costs, and the Court refused to grant a rule calling upon the defendant in replevin to find security for costs, although it was sworn that neither the defendant nor the broker were able to pay them, and the defendant had taken the benefit of the insolvent act. (r)

When not in a qui tam action on account of plaintiff's poverty.

But even in a *qui tam* action, the Court will not stay the proceedings until security for costs on the ground of the plaintiff's poverty, and having commenced several similar actions. (s)

XX. Staying proceedings in ejectment or qui tam actions *until residence* of plaintiff be stated or security for costs given. (t)

In ejectment, if the residence of the lessor of the plaintiff be unknown, and in qui tam actions, the Courts will stay proceedings until the residence be accurately stated, or in the alternative until security for costs be given. (t) And giving the plaintiff's residence as "at Peel's Coffee-house, Fleet Street," is too general, and the defendant may obtain an order or rule for a better residence. (u) We have seen that *in all personal actions* a defendant has now a right to call on and compel the plaintiff's attorney to state the true residence of the plaintiff; (x) and if plaintiff's attorney deliver a false statement, he may be proceeded against by attachment and have to pay costs. (y)

XXI. Staying proceedings until *payment* of costs of a prior action. (z)

In case of a *second ejectment* the proceedings may in general on application be stayed until the costs of a prior action founded on the *same title* have been paid, and also the costs of an action for the mesne profits; (z) and this, although the former action was discontinued before consent rule or plea; (a) and where the assignees of an insolvent brought a second ejectment, the case was considered within the rule. (b) But the

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(q) *Mason* v. *Polhill*, 3 Tyr. R. 595; 2 Dowl. 61, S. C.

(r) *Hiskett* v. *Biddle*, 3 Dowl. 634.

(s) Tidd, 9th ed. 535; *Gregory* v. *Elridge*, 2 Crom. & M. 336; 2 Dowl. 259.

(t) Tidd, 9th ed. 533, 534.

(u) *Hodson* v. *Gamble*, 3 Dowl. 174.

(x) 2 W. 4, c. 39, s. 17; *ante*, vol. iii. 210, 251; Reg. Gen. Mich. T. 3 W. 4, r. 14.

(y) *Neal* v. *Holder*, 3 Dowl. 493; *ante*, vol. iii. 351.

(z) Tidd, 9th ed. 538; *Doe* d. *Cotterell* v. *Roe*, 1 Chitty's R. 195.

(a) *Doe* v. *Langdon*, 5 Bar. & Adol. 864.

(b) *Doe* d. *Standish* v. *Roe*, id. 878.

Court refused to stay proceedings in a real action until the costs of a prior ejectment had been paid. (c)

CHAP. XVIII. XXI. STAYING PROCEEDINGS, &c.

XXII. Staying proceedings under other particular statutes.

There are also some particular acts, which expressly authorize *summary applications*, principally between declaration and plea, as the *annuity act*, 53 G. 3, c. 141; (d) the *mortgage act*, 7 G. 2, c. 20; (e) the *landlord and tenant act*, 11 G. 2, c. 19, s. 17; *bail-bond act*, 4 Ann. c. 16; (f) *replevin bond act*, 11 G. 2, c. 19, s. 23, and numerous other acts, the summary proceedings under which have been partially noticed in previous pages. When it is supposed to be expedient to make an application under either of these acts, it is particularly essential to examine each varying enactment and precisely to comply with the particular provision.

XXIII. Staying proceedings in other cases, not before enumerated, without consent.

There are other cases, as well at common law as under particular statutes, that it would be difficult to enumerate, where a defendant may obtain relief by *summary application* to a judge or the Court, *before he has by pleading* increased the expense and professed to refer his defence to a jury. And such mode of determining *collateral* matters, independent of facts and merits, to be properly tried by a jury, on principle, should be encouraged, as in general attended with less expense than a trial at nisi prius or a formal argument on demurrer in banc. Thus probably to protect such an individual from liability to pay an arrear of interest on a judgment, the lord's act, 32 G. 2, c. 28, s. 20, enacts that no action *of debt* on a judgment shall be brought against a person discharged under that act, although scire facias may be issued so as to have execution against his future effects; and if such action of debt were brought, the Court, to lessen costs, would probably interfere on motion, although there might be a more expensive defence by plea.

XXIV. When a judge or the Court has no power to stay proceedings on unusual terms, without consent, even on reasonable security.

But we have seen that neither the Court nor a judge has, at this stage of an action, any discretionary power, *without the plaintiff's consent*, to stay proceedings upon *unusual* terms, however just and reasonable. As on the terms of the defendant's undertaking to pay the debt by *monthly* instalments, (g) though we find that he has considerable discretionary power as to the time of issuing execution after a writ of inquiry or verdict; and although most of the Court of Request acts invest

(c) *Bowyear* v. *Bowyear*, 2 Dowl. 207; *Chatfield* v. *Souter*, 3 Bing. 167.
(d) *Ante*, vol. ii. 329; Tidd, 522.
(e) *Ante*, vol. ii. 331.
(f) *Id.* 333.
(g) *Ante*, vol. iii. 28; *Kirby* v. *Ellison*, 2 Dowl. 219; 4 Tyr. 239.

CHAP. XVIII. XXIV. STAYING PROCEEDINGS, &c.

the commissioners with a wholesome discretionary jurisdiction in this respect, and although a bill was recently attempted to be passed to extend that power to the superior Courts, (h) yet at present neither has that jurisdiction.

XXV. Striking out superfluous or scandalous matter and second counts. (i)

If the defendant cannot *stay the proceedings* on one of the several before mentioned grounds, his next step, before his time for pleading has expired, will be to *endeavour to reduce the length of the declaration*, either on account of *superfluous matter* or *unnecessary counts*, objectionable before or since the late rules; as that a count on a bill of exchange or promissory note, or an indebitatus count in assumpsit or debt, exceeds the length expressly *prescribed* by Reg. Gen. Trin. T. 1 W. 4, and subject to costs as prescribed by that rule; (k) or that there is a *second* count *on the same subject-matter* of complaint, contrary to Reg. Gen. Hil. T. 4 W. 4, reg. 5, 6 and 7, which also subjects unnecessary counts, pleas, or allegations to be struck out. (l) So if a declaration unnecessarily contain defamatory, indecent or impertinent matter, the objectionable words may on application be struck out; as if in a declaration at the suit of a surgeon it be unnecessarily stated that he had cured the defendant of the venereal disease, and exemplary costs were ordered to be allowed to the applicant. (m)

To whom and how to apply.

The Reg. Gen. Hil. T. 4 W. 4, reg. 6, seems imperative, that the application to strike out a *second count* shall be to a *single judge at chambers*, and not to the *Court in banc;* and the decision of the single judge would probably be considered conclusive. (n) Before that rule it was the practice, at least in *new* cases, to *move* the *Court* on an affidavit, shortly describing the declaration and its length, and the objectionable matter, and any vexatious expressions used by the plaintiff or his attorney with respect to the length of the declaration, or his

(h) See Lord Wynford's Suits at Law Bill, ordered to be printed 28 February, 1833, last clause, but negatived in second reading in Lords, without a division, April, 1833. If the superior Court had to exercise such adverse jurisdiction, their time would be incessantly occupied by determining upon long and frequently contradictory and uncertain affidavits upon the adequacy of proposed security to be given as the price of indulgence, and in a Court of law at least it would be difficult to sustain a principle that a plaintiff, who may have urgent immediate occasion for the payment of his admitted just debt, should in favour of a defendant incur the risk of becoming a bankrupt, or being obliged to compromise with his own creditors in order to prevent inconvenience to his debtor.

(i) See in general Tidd, 9th ed. 616 to 619; 1 Arch. K. B. 4th ed. 224; 2 id. 828.

(k) *Ante*, 476.

(l) *Ante*, 486.

(m) *Anonymous*, 2 Wilson, 20; *Sanderson's bail*, 1 Chitty's R. 676.

(n) *Semble;* see observations of Denman, C. J., and Patteson, J., in *Rex* v. *Archbishop of York and others*, 1 Adolph. & Ellis, 397; 3 Nev. & Man. 453, S. C.; *ante*, vol. iii. 35.

determination to increase costs;(o) or not unfrequently on a short affidavit merely verifying and annexing the declaration, and producing it to the Court, though perhaps the latter course was objectionable, as it might render it necessary for the plaintiff to take a copy of the declaration filed with the affidavit, if he should show cause. The Court would then in a *clear case*, in order to avoid the increase of expense by attendance before the master or prothonotary, themselves order the objectionable matter to be struck out, and in cases of vexation, as when the plaintiff was an attorney, that the plaintiff should pay the costs of the application.(p) But if the case be not clear, the Courts will refer the matter to the master or prothonotary, and decide upon his report. (q)

Before the recent rule as to striking out second counts, the Court of King's Bench, of late, in a clear case, declined to interfere on motion, saying the case was more fit for application to *a judge at chambers*;(r) and since such rule it may be inferred that an application in cases of this nature should now, at least in the first instance, be made to a judge at chambers, especially when the matter objected to has not very vexatiously increased the length and expense, (as the unnecessary repetition of venue,) and when a motion to the Court would, as observed by the Court in a modern case, in reality be more vexatious even than the matter complained of. (s) In a late case, although the declaration deviated from the prescribed form of *commencement*, and irregularly described the plaintiff as debtor to the king, the Court of Exchequer, on motion, refused to grant a rule until after an application had been made to the plaintiff's attorney to strike out the objectionable matter, and he had refused to comply, but upon such refusal they granted a rule nisi for the irregularity. (t)

Time of application.

As respects the *time* of application it would seem essential that the declaration should have previously been *delivered*, or if filed, that the defendant should have *taken* it out of the office. (u) It may be after an order for time to plead. (x) It should in strictness be made before pleading, (x) but in one

(o) As where a counsel in an action, in which he was personally interested, had declared that he had purposely drawn the declaration in a lengthy and intricate way, on purpose to catch the defendant and scourge him with a rod of iron, and that he had so improved the art that the paper-book would amount to three thousand sheets, and he would ruin his opponent, and where the Court directed the settling of the issue on *a quarter of a sheet of paper*, *Yates* v. *Carlisle*, 1 Bla. Rep. 270.

(p) Tidd, 616, note (d); *Bayley* v. *Watkins*, 1 Chitty's Rep. 449, (a), 450; *Gabell* v. *Shaw*, 2 Chitty's Rep. 299.

(q) *Newby* v. *Mason*, 1 Dowl. & R. 508; *Bayley* v. *Watkins*, 1 Chitty's Rep. 450, (a).

(r) MS.

(s) *Brindley* v. *Bennett*, 2 Bing. 184; 9 Moore, 358, S. C.

(t) *Hart* v. *Dally*, 2 Dowl. 257.

(u) *Law* v. *Williamson*, Hil. 31 Geo. 3, C. P.; Impey, C. P. 7th edit. 179; Tidd, 618.

(x) *Wilkins* v. *Perry*, R. T. Hardwick, 129; *Law* v. *Williamson*, Impey, C. P. 6th edit. 170; 2 Arch. K. B. 4th edit. 829.

CHAP. XVIII. XXV. STRIKING OUT COUNTS, &c.

instance in Common Pleas a motion succeeded even after pleading; but, at all events, the application must be before further expense has been incurred by the superfluous matter having been engrossed on the record. (y)

Mode of applying to strike out a *second* count, under Reg. Gen. Hil. T. 4 W. 4, r. 5 and 6.

Independently of any express rule of Court it will be obvious to every fair practitioner, that before he puts the plaintiff to any expense he should *first civilly apply* to his attorney, and in writing point out the superfluous matter objected to, and request him to strike it out, and not apply to a judge or the Court, until compliance with such request has been refused; and even then the defendant's attorney should well consider whether the Court may not observe that really a motion to strike out is more vexatious than the previous introduction of the superfluous matter. (z)

The Reg. Gen. Hil. T. 4 W. 4, r. 6, orders, that where more than one count shall have been used in *apparent violation* of the 5th rule, the opposite party shall be at liberty to apply to a judge, suggesting that two or more of the counts, pleas, &c. are founded on the *same subject-matter of complaint, or ground of answer, or defence,* for an order that all the counts, pleas, &c. introduced in violation of the rule, be struck out at the cost of the party pleading, whereupon the judge *shall* order accordingly, unless he shall be satisfied, &c." (a)

The usual form of a *summons* and order are given in the note. (b) The taxed costs ultimately paid in this case to the

(y) *Thomas* v. *Jackson*, 10 Moore, 152; 2 Bing. 453, S. C.; but see *Yates* v. *Carlisle*, 1 Bla. R. 270.

(z) See observation of Court in *Brindley* v. *Dennett*, 2 Bing. 184.

(a) See the terms of the rule, *ante*, 486.

Form of summons to strike out one count.

(b) *Marsh* v. *Griffin.* } Let the plaintiff's attorney or agent attend me at my chambers in Serjeants'-Inn, to-morrow, at three of the clock in the afternoon, *to show cause* why the superfluous counts in the declaration in this action should not be struck out, and why the plaintiff should not pay the costs occasioned by this application. J. Parke.
Dated &c.

Form of order thereupon.

I allow the first count and the count for money had and received and on an account stated, being satisfied upon cause shown, that *a distinct subject-matter of complaint* is bonâ fide intended to be established in respect of each of such counts. But I order that the common counts for work and materials and money paid should be struck out, and that the plaintiff should pay the costs as prayed. W. B.
Mr. Baron Bolland.

Defendant's Attorney's Bill of Costs relating to such Summons and Order.

Column of Items taxed off. £.	s.	d.	Items as charged in Defendant's Attorney's Bill.	£.	s.	d.
0	6	8	Attending Mr. —— on declaration, when he recommended a summons to be taken out to strike out the superfluous counts	0	6	8
			Summons for that purpose, copy and service	0	5	0
0	6	8	Instructions for Brief for Mr. —— to attend judge on summons	0	6	8
0	3	4	Drawing same, and fair copy one brief sheet	0	10	0

defendant,(c) merely on account of introducing the few words, "and in the sum of £—— for work and labour done and materials found by the plaintiff for the defendant at his request, "and in £——, for money paid by the plaintiff for the defendant at his request," occasioned the *plaintiff several pounds*, and the *defendant* also some pounds, not allowed on taxation, as appears by the bill of costs also stated in the note, besides the costs of *three* attendances of 6*s.* 8*d.* each, paid by the plaintiff to his own attorney, (and if he also had attended by counsel, his costs of resisting the summons would have been nearly equal to those of the defendant,) for his trouble in opposing the defendant's summons,(d) and as the defendant had paid his counsel a fee of three guineas, and his clerk 2*s.* 6*d.*, for his attendance before the judge, in support of the summons, and the master only *allowed two guineas*, and also disallowed some other items, the defendant himself, although he succeeded, yet he gained rather an unprofitable victory, and, indeed, was considerably out of pocket, and his attorney alone profited at the expense of his brother practitioner, without obtaining any real advantage for his client. Hence it is clear that very few cases of second counts, or of repetition of venue,

£.	s.	d.		£.	s.	d.
1	1	0	Paid him therewith, and clerk	3	5	6
0	3	4	Attending him	0	6	8
			Attending summons, and Mr. —— was to see Mr. —— thereon previous to Baron's decision	0	6	8
			Paid judge's clerk's fee	0	7	6
0	3	4	Attending Mr. —— on the subject of striking out the counts, &c. and he decided to attend Baron again	0	6	8
0	13	4	Attending Mr. —— as to course to be pursued, and he recommended an attendance before Baron Alderson, and attending at his lordship's chambers, but he was not likely to attend for a fortnight, and Mr. —— recommended a fresh summons before another baron	0	13	4
0	3	4	Attending Mr. ——, and instructing him to attend baron ——. Mr. —— declined taking a second fee	0	6	8
			(N. B. No fresh summons was taken out.)			
			Attending summons when order made	0	6	8
			Paid for order, copy, and service	0	5	0
			Paid baron's clerk	0	7	6
3	0	4	*Taxed off* Charged costs	8	0	4
			Struck off	3	0	4
			Allowed costs	5	0	0

(c) In this case the costs were not paid until the *conclusion* of the action, after a reference on the trial to a barrister, but it should seem, from the terms of the rule, that the costs of the summons and order might be enforced in *first* instance.

(d) The plaintiff's attorney would have been justified in also having had the assistance of his counsel, or of the gentleman who settled the declaration, in *opposing* the summons, whereby the plaintiff's costs would have been much increased: they would, in fact, have been within £1 of what the defendant's were in supporting the summons.

CHAP. XVIII. XXV. Striking out Counts, &c.

can occur, when it will really be worth while for the benefit of the *defendant* to take out a summons to strike out superfluous counts or matter. If the words objected to had continued and been repeated in the *issue*, nisi prius record and briefs, the expense thereby increased could not, perhaps, have exceeded one pound.(e) The rule itself may be salutary, but it is to be hoped that few indeed will be the practitioners who will attempt to put it in force.

However there is another object, not perhaps more worthy, viz. that of *embarrassing and annoying the plaintiff and his attorney*, and depriving the former of the security of several counts varying the statement, and compelling him to proceed to trial on one count only at the risk of a variance which the plaintiff could not anticipate (in consequence of the witnesses being in the defendant's power, or of their having wilfully misrepresented the evidence they proposed to give), and of the judge refusing to permit an amendment, and this even in cases where counsel and pleaders of great experience and the most learned judges have considered it advisable, if not necessary, in a *mixed action*, as quare impedit, not within the above rule, to frame and permit even five special counts on the same subject-matter, as being essential to the fair and just trial of the right. (f)

Proceedings on such a summons.

We have before suggested that it is expedient fully to explain to the learned judge why the second count was introduced, especially the bonâ fide object to avoid a variance; but if he should be of opinion that the second count ought not to be retained, the plaintiff's attorney should submit, and not pertinaciously retain the second count at the risk of losing *all* the costs in case a *distinct subject-matter* should not be established on the trial, but be prepared by affidavit, and in person and by counsel, to satisfy the judge on the trial that there had been a second count introduced in order to avoid a variance, but struck out, and thereby the more induce the judge to permit an amendment of the variance.

XXVI. Of reducing the length of plead-

When there are really *several distinct* subject-matters of complaint entitling a plaintiff in respect of each to *distinct*

(e) This would depend upon what pleas the defendant pleaded to these counts. If he pleaded non-assumpsit *only*, some fraction of a pound would pay them.

(f) In *Rex* v. *Archbishop of York and others*, 1 Adol. & Ell. 397; 3 Nev. & Man. 453; Mr. Tidd and Mr. Chitty considered it essential to introduce *five* counts in quare impedit on the same subject, and which a learned judge sanctioned on summons expressly for leave to add three counts.

CHAP. XVIII. XXVI. Shortening Pleadings, consent. ings by agreement and rule thereon.

damages, the case is not within the Reg. Gen. Hil. T. 4 W. 4, nor have the Courts any jurisdiction to prevent the plaintiff from introducing into his declaration as many counts as there are contracts or injuries; and therefore where there were 286 counts, each upon a separate country banker's promissory note for one guinea payable to bearer, a rule nisi for reducing the length of the declaration was discharged. (*g*) But in a similar case by *consent*, and on a rule by which defendant undertook to permit all the notes to be given in evidence either before the master or a jury under the count upon an account stated, the Court ordered all the counts on the notes but one to be struck out. (*h*) But care must be taken that the bail consent not to be discharged, and that all other difficulties be anticipated.

XXVII. Of consolidating several actions into one. (*i*)

At this stage of the cause also (i. e. between declaration and plea) are usually made applications to *consolidate several actions or demands into one*, when the same plaintiff having several claims against the same defendant, all complete at the same time, or at least before he has issued any writ, *vexatiously* or *unnecessarily* commences *several actions*, as upon several bills of exchange or promissory notes, or for several trespasses. In these cases the Court or a judge will upon summons or motion *compel* the plaintiff, however reluctant, to *consolidate* and include the whole in *one declaration*, and pay the costs of the application; and this although the plaintiff may thereby lose the security of the bail in the second action. (*k*) But where several actions have been brought upon separate bills or notes, or other causes of action *accruing at different times*, and immediately each so accrued, then, as the plaintiff was not bound to wait till all his claims had accrued due, his separate proceedings for each as they arose are not considered vexatious; and though the Court may on terms, and as a favour to the defendant, and with the consent of the plaintiff, pronounce a rule *suspending* the trials of more than one action, yet such rule will not be of course; (*l*)

(*g*) *Lane* v. *Smith*, 3 Smith, 113; Tidd, 617.

(*h*) *Cunnack* v. *Gundry*, 3 Bar. & Ald. 272; 1 Chitty's R. 709, S. C., where see the proper form of the rule; and see observations of Lord Tenterden in *Oldershaw* v. *Tregwell*, 3 Car. & P. 58.

(*i*) See in general Tidd, 9th ed. 614 to 616; 2 Arch. K. B. 830 to 833; *Cecil* v. *Briggs*, 2 Term R. 639, and note; 1 Chitty's R. 709.

(*k*) *Cecil* v. *Brigges*, 2 Term R. 639; *Anonymous*, note (*a*) 1 Chitty's R. 709; Tidd, 9 ed. 614.

(*l*) *Mussenden* v. *O'Hara*, Tidd, 9 ed. 614; *Le Jeune* v. *Sheridan*, Forrest's Rep. 30; *Wise* v. *Prowse*, 9 Price, 393; *Oldershaw* v. *Tregwell*, 3 Car. & P. 58, and post.

CHAP. XVIII. XXVII. OF CONSOLIDATING &c.

Of consolidation rules suspending the proceedings in several actions on the same *policy* or *bond*, &c. against several separate defendants until one action has been tried.

and yet the term consolidation rule is, though improperly, used as applicable to both cases.

So even when *several* actions have been properly and *necessarily* brought on the same *policy of insurance* against sea-risks against *several separate* underwriters, it has long been the practice, at the instance of the defendants, and as a favour, provided the plaintiff will consent, to *suspend* the proceedings in all the actions but one, until that has been tried; the other defendants entering into and being bound by what is termed a *consolidation rule*, (*m*) though that term seems here misapplied, for there is no *consolidation* of the several actions, but merely a *stay of proceedings* in all but one, and an order that they shall abide the result of the trial of that single action, the other defendants engaging to pay the amount of their several subscriptions and costs, in case a verdict shall be given therein for the plaintiff; (*n*) but if the plaintiff will not consent, the Court will stay his proceedings by giving the defendants time to plead in all the actions but one, by which expedient his actions are in effect stayed. (*o*) The Courts however will make the defendants applying for the rule submit to reasonable terms, as admitting the policy, and producing and giving copies of books and papers, and undertaking not to file a bill in equity or bring a writ of error. The consolidation rule in K. B. and judge's order in C. P. renders the verdict in the action that is tried obligatory only on the *defendants*, and not on the plaintiff; and in a late case the Court of K. B. refused, without the consent of the plaintiff, to make a consolidation rule upon the terms that both *the plaintiff* and the defendants should be bound in all the actions by the event of one. (*p*) The practice of suspending the proceedings in several actions now extends to several separate actions on the *same bond* against several obligors, and perhaps to the other cases where it may be manifest that precisely the same point is to be tried in all the actions. (*q*) Thus where five several separate actions are simultaneously commenced and pending on a *bond*, viz. against a principal and four several sureties, one of them may pay into Court in the action against him a sum which it is insisted is suffi-

(*m*) See form of *Rule* in K. B., Tidd's Forms, 224; and of judgment thereon, *id.* 336; and of the judge's order in C. P., Tidd's Forms, 224.

(*n*) Parks on Insurance, introd., and 1 Marshal on Insurance, 602; and per Wood, B. in *Foreman* v. *Southwood*, 8 Price, 575, 576.

(*o*) *Id.*; Tidd, 9 ed. 615.

(*p*) *Doyle* v. *Anderson*, 1 Adol. & El. 635.

(*q*) See note (*r*), 645, *infra*, and *Oldershaw* v. *Tregwell*, 3 Car. & P. 58; *Nicholls* v. *Lefevre*, 3 Dowl. 135.

cient to cover the plaintiff's claim, and thereupon a judge's order may be obtained for staying the proceedings in the other actions on the terms that they should abide the event of the action to be tried, and an order was made in the subscribed form. (r)

But where six actions of trover had been brought against the *same defendant* by six different plaintiffs employing the same attorney, the Court refused to order the proceedings in five of them to be stayed to abide the result of one, the plaintiffs not consenting, and it being sworn that the causes of action were different in all of them. (s)

Before a plaintiff or several defendants consent to a rule of this nature, each should well consider whether all the actions and defences stand in precisely the same situation as to evidence, and decide accordingly.

The Courts will not allow a rule of this nature to be opened on the ground that evidence has been discovered since it was entered into, placing one defendant in a better or worse situation than the others. (t) However a consolidation rule was in one case modified, and a new trial granted on the ground of a material witness having absented himself, and on the terms of bringing the money into Court; (u) and although by the terms of the rule the verdict is to be binding on all the defendants, still this is subject to the just interposition of the Court. The proceedings to enforce judgment and payment under the consolidation rule have been fully stated by Mr. Tidd. (y)

There appears to have been only one *recent regulation* in the practice relative to this head, viz. Reg. Gen. Hil. T. 2 W. 4, r. 104, orders that "where money is paid into Court in several "actions which are *consolidated*, and the plaintiff, without

(r) *Cox* v. *Lythgoe* and four other defendants, in separate actions, July 22, 1835; and see *Oldershaw* v. *Tregwell*, 3 Car. & P. 58. But in *Royal Exchange Company* v. ——, Hil. T. 1815, the Court refused to consolidate two actions on *two bonds*, though precisely similar, 1 Chitty's Rep. 709, in note.

Form of judge's order in an action pending in K. B.

Cox and others v. *R. Lythgoe*, Agent;
Same v. *R. Lythgoe*, Schoolmaster;
Same v. *J. Lythgoe*;
Same v. *G. Lythgoe*;
Same v. *J. Hollingworth*.

E. H. Alderson:—Upon hearing the attorneys or agents on both sides, I do order that the cause of *Cox* v. *Hollingworth* be tried; that the others be stayed and abide the event; and that if early judgment shall be ordered in the action to be tried, judgment shall be given at the same time as to the other actions.

Dated the 22nd day of July, 1835.

(s) *Nicholls* v. *Lefevre*, 3 Dowl. 135.

(t) *Pullen* v. *Parry*, Hil. T. 1812, 1 Chitty's R. 709, note (a).

(u) *Holman* v. ——, Hil. T. 1815, 1 Chitty's R. 710, in note.

(x) Tidd, 615.

(y) Tidd, 9 ed. 615, 616.

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"taxing costs, proceeds to trial on one, and fails, he shall be "entitled to costs on the others up to the time of paying "money into Court," which rule assimilates the practice of K. B. to the previous practice of C. P., which was considered preferable. (z)

XXVIII. Applications to *change the venue.* (a)

1. In what cases application is of course or not.

Between declaration and plea, an application by a defendant *to change the venue* or place of trial, from the county named in the declaration to another county, is to be made when that proceeding is *of right, and of course* on the *usual affidavit,* and as *distinguishable* from *special applications* for the same purpose, which are now not in general to be made until *after plea.* Such an application may be useful as well when the defendant intends to plead and try the action as when he intends to suffer judgment by default, and merely endeavour to reduce the amount of damages upon the execution of an inquiry. An application as of course is professedly made on the ground that the transaction took place in the county named by the defendant, and that it is more proper it should be tried there than in the county named in the declaration; but very frequently the defendant's object is to delay the trial when the venue has been laid in London or Middlesex; and sometimes when the plaintiff has declared just before the assizes, and laid the venue in the country, the application is then made with the same object to change the venue into London or Middlesex, so as to delay the trial until or after the next term. There is much learning in the books upon the subject of venue and changing the venue. (b) It was always a just principle that every action should be tried in the very county where the subject of it accrued, because it was supposed that probably subjects, in some measure connected with local usages, would be *there* best understood and appreciated; and also because probably the witnesses would reside there, and might be more readily brought to that place of trial; so that besides the necessity for the plaintiff's laying the venue in the proper county in *local* actions, it was deemed proper to afford the defendant the opportunity of compelling the trial in all actions in the proper county where the transaction really occurred, if he would venture to swear *that the cause of action arose there and not elsewhere;* and this was the reasonable origin of the practice of changing the

(z) Jervis's Rules, 71, note (h).

(a) See in general Tidd, 9th ed. 601 to 614; 2 Arch. K. B. 821 to 828; 2 Arch. C. P. [37 to 41], 189; and see a full note to *Bagnall* v. *Shipham*, 1 Cromp. & Jervis, 378, note (h).

(b) *Id.*

venue. (c) It may suffice here to observe that in *local* actions the plaintiff is *obliged* to lay the venue in the proper county, and neither party, without the actual permission of the Court, can in such case change the place of trial. In *transitory* actions, where the subjects *might* have arisen in any county, the plaintiff, when privileged as a serjeant, barrister, attorney, or other officer of the Court, *and suing as such*, had and still has, on account of his attendance in the Courts at Westminster, relating to the interests of their clients, a right to lay and keep the venue in *Middlesex*, and then the defendant cannot change the venue or trial to another county. (d) In *other transitory* actions, the subjects of which arose abroad, or might and probably did in part occur in *several counties*, or in any county, although the *plaintiff* has in the first instance the *option* of laying the venue in any county he may prefer; and in such transitory actions the defendant is not allowed to change the venue, unless he can *properly swear* "that the plaintiff's "cause of action arose in another named county different to "that mentioned in the declaration, and not in that county nor "elsewhere than in the county named by the defendant." And by a course of decisions (the principle of some of which, however, seems doubtful, and most of which require consideration,) it has been established that a defendant cannot properly make such an affidavit *in certain actions*, as where the cause of action arose *abroad*, or even *probably* arose in *several counties*, as an action against a carrier or lighterman for negligence, where the delivery of the goods was in one county and the loss or damage in another, (e) or an action for an escape or false return. (*f*) So all causes of action upon any *specialty*, as a bond, lease, policy of insurance, or charter-party under seal, in respect of the legal doctrine that debitum et contractus sunt nullius loci, and that bonds and other specialities are bona notabilia, wherever they happen to be, the venue could not be changed *as a matter of course* by the defendant. (*g*) And on account

(c) 3 Bla. Com. 294, 295.

(d) Tidd, 606. It will be observed that, although the uniformity of process act, 2 W. 4, c. 39, introduces new forms of proceedings, yet sect. 19 expressly reserves *privileges*, and an attorney, when plaintiff, and suing alone, still retains his privilege to lay and retain the venue in *Middlesex*, *Partington* v. *Woodcock*, 2 Dowl. 550; but then it must appear from the *declaration* or *proceedings* that the plaintiff sues as an attorney or in person, and not by another attorney, *Lowless* v. *Tims*, 3 Dowl. 707.

(e) *Heathcote's case*, 2 Salk. 670; *Edie* v. *Glover*, cited Tidd, 603, note (*i*); but in *Williams* v. *Lane*, 4 Taunt. 729; and *Curtis* v. *Drinkwater*, 2 Bar. & Adol. 169, where in an action against a stage coach proprietor for injury to a passenger, who became so in one county and received an injury in another, the venue was changed.

(*f*) See cases Tidd, 603.

(*g*) See cases Tidd, 604; *Weatherby* v. *Goring*, 3 B. & Cres. 552.

of the peculiar properties of *bills of exchange and promissory notes*, (implying a consideration, and being negociable and partaking in some respects of the properties of a specialty,) when a declaration *bona fide* contains even one count on either of those instruments, the plaintiff has a right to lay his venue in any county, and the defendant cannot change it as of course; (*h*) and this extends even to a promissory note, though not payable to order, and consequently not actually negociable in different counties. (*i*) But an I. O. U. or mere signed memorandum of agreement, though declared, is not within that exception, and the venue in the action thereon may be changed. (*k*) The same rule applies to an action for a *written libel*, published in different counties; (*l*) and in the latter case, if a defendant irregularly obtain a judge's order for changing the venue, the plaintiff may move to discharge it, without giving an undertaking to give material evidence. (*l*)

But in *most other* actions, as for common debts and simple contract claims, and for torts to the person or personal property, the defendant *may as of course* (*m*) (unless when a single plaintiff be thus privileged, and proceed as privileged on the face of the proceedings, (*n*)) move to change the venue, if he can conscientiously make the prescribed affidavit presently stated.

When the application must be *special* and on special affidavits and grounds.

In all *actions whatever*, (excepting where the plaintiff is privileged to lay and retain his venue in Middlesex, (*o*)) it seems that upon *special ground* and affidavit, showing *strong reasons* for the measure, and upon a *special application* to the Court for a rule nisi, and upon the defendant's submitting to just and reasonable terms, the Court may change the venue, even in those cases where it could not be changed as a matter of course. (*p*) The principal ground is the residence of *all or most of very numerous* witnesses in the county named by the defendant, and in such a case the venue may be changed, even in an action on a bond or other specialty, and indeed *in every description of action;* (*q*) but then the affidavits must state the

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(*h*) See cases Tidd, 604; *Parmeter* v. *Otway*, 3 Dowl. 66; *Walthew* v. *Lyers*, 3 Dowl. 160; *Dawson* v. *Bowman*, *id.* 160; *semble*, overruling *Greenway* v. *Carrington*, 7 Price, 564.

(*i*) *Smith* v. *Elkins*, 1 Dowl. 426.

(*k*) *Roberts* v. *Wright*, 1 Tyr. 532; *Slade* v. *Trew*, 2 Dowl. 65; 1 Tyr. 532, S. C.

(*l*) See cases Tidd, 605; but see other cases, *Hobart* v. *Wilkins*, 1 Dowl. 460; *Greenslade* v. *Ross*, 3 Dowl. 697; 2 Arch. K. B. 4th ed. 822, 823; *contra* *Clementson* v. *Newcombe*, 1 Gale, 425; 1 Cr. M. & Ros. 776; 3 Dowl. 425, S. C.; *Dawson* v. *Bowman*, 3 Dowl. 160.

(*m*) In *crim. con. Guard* v. *Hodge*, 10 East, 32; *in assault*, *Shepheard* v. *Hall*, 2 Chitty's R. 417.

(*n*) *Ante*, 647, note (*d*).

(*o*) Tidd, 605; *Pitcher* v. *Sheriff of Monmouth*, 2 Marsh. 152; 2 Chitty's R. 418, in note.

(*p*) See cases Tidd, 605.

(*q*) *Foster* v. *Taylor*, 1 T. R. 781; and other cases, Tidd, 605.

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precise defence, and not only show that there are numerous witnesses, but also the necessity for examining and intention to examine them, and the circumstance of there being many witnesses will not alone suffice; (r) and it must appear not merely that the expenses of a trial in the county where the plaintiff laid the venue would be greater, but that the expenses would be *very greatly* enhanced. (s)

Changing place of trial *in local* actions under 3 & 4 W. 4, c. 42, s. 22.

So when it is sworn and established to the satisfaction of the Court that *a fair trial cannot be had* in the county named in the declaration, the Courts would change the venue, as well in *transitory* as *in local actions*, before the 3 & 4 W. 4, c. 42, s. 22;(t) and that act, after reciting that unnecessary delay and expense is sometimes occasioned by the trial of local actions in the county where the cause of action has arisen, enacts, "that in any action depending in any of the *said* superior "Courts, the venue in which is by law local, the Court in "which such action shall be depending, or any judge of any "of the said Courts, may, on the application of either party, "order the *issue* to be tried, or writ of inquiry to be executed "in any other county or place than in that in which the venue "is laid; and for that purpose any such Court or judge may "order a *suggestion*(u) to be entered on the record, that the "trial may be more conveniently had, or writ of inquiry executed in the county or place where the same is ordered to "take place." In a recent action of ejectment to try the validity of a will on the ground of insanity, the Court refused to enter a suggestion on the roll under this act to change the venue from Somersetshire to London, on the mere ground that the testator resided in London at the time of his death, and that the evidence of *one eminent medical man* living in London would be essential; because it appeared that the testator was most visited, and best known at his country estate in Somersetshire, where the will was made, and in which county there were also many witnesses. (x) And though under this act the venue may in effect be changed in an action of *trespass quare clausum fregit*, yet an allegation, that an impartial trial cannot be had, must be very satisfactorily established to induce the Court to interfere. (y)

(r) Per Littledale, J., in *Parmeter v. Otway*, 3 Dowl. 69; *Crompton v. Stewart*, 2 Cromp. & Jer. 473.

(s) *Alcock v. Cook*, 6 Bing. 155.

(t) See cases, Tidd, 605.

(u) See form, T. Chitty's Forms, 715, 716.

(x) *Doe dem. Baker v. Harmer*, 1 Harr. & Wol. 80.

(y) *Briscoe v. Roberts*, 3 Dowl. 434.

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Differences between the ordinary application, and one that is special.

There is this very material difference in the practice between applications by a defendant *as of course* upon the common affidavit to change the venue, and *special applications*, viz. that the former *must* be made *before pleading*;(z) whereas the latter cannot now *in general* be made *until after issue* has been joined, or at least until *after the defendant has pleaded*, a distinction introduced in order that the Court may ascertain from the *pleadings* what will be the precise point or issue to be tried; though probably cases may arise where the venue might be changed on special grounds, after judgment by default; as where numerous witnesses, or old or infirm witnesses, material to be examined on executing a writ of inquiry, reside in a particular county where the cause of action arose, as in an action of covenant on a farming lease; though the safer course would be to make a special application before judgment by default, offering that judgment as one of the terms.

Time of making the *ordinary* application to change venue.

From the numerous recent instances of applications to change the venue made *after plea*, it might be supposed that the long established practice had, as respects the *time* of application, been changed, but it has not. The rule still is, that a defendant cannot move to change the venue before he has appeared;(a) and that the usual and proper time to move to change the venue *as of course*, and upon the *common affidavit* that the whole cause of action accrued in the county named by the defendant, and not in that named by the plaintiff in his declaration, is to be made *after declaration and before plea.* (b) Anciently the application must have been made within eight days after declaration, being the utmost time allowed for pleading; (c) but it has long been settled that a defendant may as of course make the application in King's Bench and Common Pleas at any time after declaration and before pleading, and even after an order for time to plead on the terms of pleading issuably, (d) though when a defendant is under the terms of also taking short notice of trial at the first or other sittings within term in London or Middlesex, he cannot change the venue into the country, because a trial in the term would by that means be lost. (e) But where a defendant was under such terms in a

(z) *Ante*, 646.

(a) I. K. B. 271; I. C. P. 272.

(b) In K. B. and C. P. Rule Mich. T. 1651, s. 1; and see fully, note to *Bagnall* v. *Skipham*, 1 Cromp. & J. 377, 378.

(c) *Anonymous*, 2 Salk. 668; *Long* v. *Miller*, 2 Stra. 1192.

(d) Sayers's R. 207; *Rowley* v. *Allen*, Willes, 318; Reg Mich. 16 Geo. 2, C. P. *Wilson* v. *Harris*, 2 Bos. & P. 320.

(e) *Petyt* v. *Berkeley*, Cowp. 511; *Shipley* v. *Cooper*, 7 T. R. 698; *Nunn* v. *Taylor*, 1 Bing. 186; 7 Moore, 598, S. C. 2 Dowl. 240.

country cause, the Court permitted the defendant to change the venue, as the so doing would not delay the plaintiff. (*f*) In the Exchequer the defendant cannot as of course apply to change the venue after an order for time to plead on *all* the usual terms, and, therefore, when he is about to be subjected to terms, should take care to reserve liberty to change the venue. (*g*) But if he be only under the terms of *pleading issuably*, then he is at liberty to move to change the venue. (*h*) *After plea*, either in abatement or bar, it is too late and irregular in all the Courts to apply by the *common motion* to change the venue; (*i*) though if justice clearly require a *special* application it may be sustained after pleading. (*k*) When the practice of Common Pleas required a rule nisi, it could not be moved for on the last day of term, unles the declaration was delivered so late as to prevent the motion being made before; (*l*) but now as *the rule is absolute in the first instance in all the Courts*, a different rule would probably prevail. (*m*) But, although in ordinary cases, a defendant should apply to change the venue before he has pleaded, yet in favour of liberty, as where the defendant is a prisoner, his application may be granted even after issue and the cause has been taken down to trial, as where the venue was laid in Somersetshire, and the defendant made the cause a special jury, and on the trial sufficient special jurors not appearing, neither party prayed a tales, and afterwards, the defendant being still a prisoner, he was allowed to change the venue into Middlesex, so as to have an earlier trial, on the terms of his paying to the plaintiff the extra expenses of trying in Middlesex. (*n*) But the venue cannot be changed after a new trial has been granted. And if a defendant apply to change the venue after plea, the onus of showing *special* grounds for the change always lies upon him. (*o*)

The practice in changing the venue in *ordinary cases*.

In those cases in which we have seen that the defendant is primâ facie entitled to change the venue, in support of the ap-

(*f*) *Notts* v. *Curtis*, 2 Tyr. 307; 2 Cr. & Jer. 345, S. C.

(*g*) 1 Price, 146; *Waring* v. *Holt*, 3 Price, 3; *Brettargh* v. *Dearden*, M'Clel. & Y. 106; *Tonks* v. *Fisher*, 2 Dowl. 22.

(*h*) *Russell* v. *Hurst*, 3 Tyr. 218.

(*i*) *Talmash* v. *Penner*, 3 Bos. & P. 13; *Wigley* v. *Dubbins*, 4 Bing. 18; *Smith* v. *Walker*, 8 Taunt. 69; 2 Moore, 64, S. C.; *Amner* v. *Cattell*, 5 Bing. 208; *Moses* v. *Stevenson*, 1 Taunt. 58; see 1 Cromp. & J. 377, 8, note (*h*).

(*k*) *Bayley* v. *Beaumont*, 11 Moore, 384.

(*l*) *Ward* v. *Winch*, Barnes, 480; *Thomeur* v. *Rand*, id. 486; *Hayward* v. *Wells*, id. 489; Tidd, 609.

(*m*) But if the changing the venue would in any case prejudice the trial, the Court might impose terms, *semble*, *Amner*, v. *Cattell*, 5 Bing. 208.

(*n*) *Keys* v. *Smith*, 2 Dowl. 210; and see 2 Arch. K. B. 4th edit. 825, note (*t*), as to a plaintiff's expediting a trial.

(*o*) *Higgins* v. *Hoareman*, 3 Dowl. 549.

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Requisites of ordinary affidavit.

plication, he has long been required to make an affidavit "that "the cause of action accrued in the county named in the affi- "davit, and not in the county named in the declaration, *nor* "*elsewhere* than in the county first named in the affidavit," (*p*) and no deviating affidavit will be admitted; (*q*) and therefore, where the words "and *not elsewhere*" were omitted in the affidavit, the Court refused the common rule. (*r*) It would, from a recent decision, seem to be as well for a defendant, when the facts will warrant him in so doing, upon moving for the common rule, in addition to the above indispensable terms of his affidavit, to state the number of his numerous necessary witnesses resident in the county, into which he prays the venue to be changed, and his intention to subpœna them as witnesses, together with any other circumstances showing that it will be proper that the cause should be there tried. (*s*)

By whom affidavit to be

It will be obvious that the *defendant himself* is most competent to make this affidavit, as he must best know, as well affirmatively as negatively, what are the supposed causes of action, and where they arose, but it has been decided that an equally positive affidavit made by the defendant's attorney will suffice, (*t*) though the safest course is, for the defendant himself, if in the country, to swear to the affidavit, and if sworn by a third person the affidavit should show that the defendant is abroad. (*t*) We have seen that there are many actions in which the defendant has no right *of course* to change the venue, and, therefore, to prevent misrepresentation to the judge or the officer of the Court, who is to make the order, or draw up the rule, Reg. Trin. T. 49 Geo. 3, in King's Bench, and the practice in Common Pleas, requires the *declaration to be produced*, and the order or rule is to be drawn up as well upon reading the

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(*p*) Sty. P. R. 631; Reg. Mich. 10 Geo. 2, reg. 2, (c), K. B.; 1 Sid. 185, 442; Say. Rep 77; Tidd, 609. The invariable form is thus, and the practitioner should remind the deponent, that if the affidavit be untrue *in any part* he might be indicted for perjury; and yet this affidavit is often *too hastily made*:

Common form of affidavit on which to apply to change the venue.

In ——. Between, &c.
C. D. of ——, [*gentleman*,] the above-named defendant, maketh oath and saith, that the plaintiff's cause [*or* "causes"] of action [*if any*] arose in the county of ——, and not in the county of ——, [*the venue laid in the declaration*,] or elsewhere out of the said county of ——, [*the first-named county*.] C. D.
Sworn, &c.

(*q*) *Palmer* v. *Terry*, 2 Dowl. 566.

(*r*) *Jones* v. *Pearce*, 2 Dowl. 54.

(*s*) *Greenslade* v. *Ross*, 3 Dowl. 697.

(*t*) *Biddle* v. *Smith*, 2 Dowl. 219; *King* v. *Turner*, 1 Chitty's Rep. 58, 161; an affidavit to hold to bail may certainly be made by a third person, and a fortiori, it would seem that an affidavit to change venue may be made by any third person, see *Kelly* v. *Devereux*, 1 Wils. 339; Say. Rep. 59, S. C.; *Pieters* v. *Luytjes*, 1 Bos. & P. 1; *Andrioni* v. *Morgan*, 4 Taunt. 231; 9 Price, 322; Tidd, 178.

above mentioned *affidavit*, but in King's Bench *on reading*, and in Common Pleas *inspecting* the *declaration*, the venue is ordered to be laid in the newly named county.(*u*)

Until lately, the practice in K. B. and C. P. and Exchequer differed materially with respect to an application to change the venue. In K. B. the rule for the change was *absolute* in the first instance, but in C. P. it was nisi only; and the plaintiff had an opportunity of showing cause against the rule on affidavits.(*x*) But by the general rule of Hil. Term, 2 W. 4, reg. 103, the practice of all the Courts was assimilated to that of K. B.; it being thereby ordered that "in cases where "the application for a rule to *change the venue* is made upon "the *usual affidavit only*, the rule shall be absolute in the first "instance; and the *venue shall not be brought back*, except "upon an undertaking of the plaintiff to give material evidence "in the county in which the venue was originally laid."(*y*) So that now if a defendant, in those actions in which it is of course to change the venue, will venture to swear, however falsely, that the whole cause of action accrued in a different county named by him, the plaintiff has no other course but to give what is termed the *usual undertaking*, viz. an undertaking to give some material evidence that originated or arose in the county originally named in the declaration, on which terms only can he retain the trial in the original county.

Discharging the order or rule for changing the venue as irregularly obtained.

If however the venue has been *irregularly changed*, as in one of the actions in which we have seen a defendant cannot as of *course* change the venue upon the *common affidavit*, then the plaintiff may, upon an affidavit of the facts, and showing that the declaration was on a bond or bill of exchange or promissory note or libel, published in two or more counties, move to *discharge such rule or order*, without being placed under the terms of giving material evidence in the county where he had laid the venue;(*z*) and in a recent case, where inadvertently the venue had been changed on an application as of course on the usual affidavit and rule, although one count of the declaration was on a bill of exchange, and thereupon the plaintiff obtained a rule nisi for discharging such rule for changing the venue, the Court made the latter rule absolute, and refused to permit the defendant to go into special affida-

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(*u*) Tidd, 609; see the forms of judge's order and rule for changing the venue, post, 654, 655, in notes.

(*x*) And see fully the previous practice, Tidd, 608, 611, 612; and the note to *Bagnall* v. *Shipham*, 1 Crom. & Jer. 377, 378.

(*y*) See the former practice, Jervis's Rules, 70, note (*a*).

(*z*) *Clementson* v. *Newcomb*, 1 Gale, 60; 1 Crom. M. & R. 776; 3 Dowl. 425, S. C.

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vits, showing that all the witnesses resided in the county into which the venue had been thus irregularly changed; saying that the defendant should have moved a *special* on those affidavits.(a) But where in an action for *a libel* the defendant had changed the venue *after plea of* general issue, and a plea of justification of the truth of the libel upon the usual affidavit, and also upon *special ground* stated in the affidavit, that the residence of his witness was in Lancashire, and the plaintiff applied to bring back the venue to Middlesex, on affidavits that there was no truth in the libel, and that he believed he could not have a fair trial in Liverpool, and that he had eight witnesses in London, the defendant consenting to withdraw the plea of general issue, and to produce a copy of the newspaper, to save expense of witnesses from the stamp office, the Court refused the rule prayed by plaintiff.(b)

The plaintiff may also in a *special affidavit*, showing that an impartial trial cannot be had in the county named by the defendant, and into which he has removed the venue, and, on a special application and rule nisi, may *bring back* the venue to the original county.(c) But where a defendant had changed the venue to the county where the cause of action arose, it was held to be no reason for bringing back the venue that the action was for the balance of an election dinner, and that the defendant was treasurer of the county, and an electioneering agent, and a person of great influence there, it being a special jury cause.(d)

Of the plaintiff's undertaking to give material evidence in original county, and what a compliance.

In general, however, a plaintiff, when he is well advised that he can safely undertake to give material evidence in the first named county, usually gives the proper undertaking, and thereby gets rid of the effect of the common rule for changing the venue, and tries the cause in such first named county. The subscribed forms of the usual rule and order and undertaking will elucidate the practice. (e) The application by the plaintiff

(a) *Id. ibid.; Dawson* v. *Bowman*, 3 Dowl. 160.

(b) *Greenslade* v. *Ross*, 3 Dowl. 697.

(c) See form of affidavit in such a case, T. Chitty's Forms, 657.

(d) *Hill* v. *Payne*, 3 Dowl. 695.

Form of rule to change the venue in term time.

A. B. agst. C. D. (e) On —— day of ——, A. D. 1835.

Upon reading the affidavit of C. D., and the declaration in this cause, it is ordered, that the venue in this action be laid in the county of ——; but it is further ordered, that the plaintiff be at liberty to discharge this rule upon producing counsel's [or *in C. P.* "serjeant's"] hand to the clerk of the rules and orders of this Court, and undertaking at the trial of this cause to give material evidence of some matter in issue arising in the county of ——, where the cause of action was first laid. Upon the motion of Mr. ——.

to discharge the defendant's rule for changing the venue, should properly be made immediately, or at least before the venue has been altered in the declaration or issue; (*f*) but there are instances of the application having succeeded even after the cause had been carried down to trial and made a remanet; (*g*) and as a defendant, when a prisoner, has been allowed after a trial has gone off from defect of jurors to move to change the venue, so as to expedite the trial, there seems no reason why a plaintiff should not be equally allowed thus to expedite a trial. (*h*)

What is deemed material evidence.

The older instances of what is deemed sufficient evidence in compliance with this rule, have been collected in previous publications. (*i*) In a recent action against a coach proprietor for negligence, proof that the plaintiff suffered pain and incurred expense in the county where he had originally laid the venue, was considered to be a sufficient compliance with his undertaking to give material evidence of a matter in issue arising there; (*k*) and it has been decided that the putting into the post a letter in the county where goods were made, directed to A. in another county, and containing an invoice of the quantity, quality, and price of goods sent at the same date to A. by another conveyance, was *material evidence* in the first county, so as to satisfy an undertaking by the plaintiff to give material evidence there. (*l*)

Time of applying on *special* grounds.

The Courts in general now refuse to change the venue on a special application *before issue has been joined*, because until then the precise nature of the question to be tried, and consequently the number and description of the witnesses, cannot well be ascertained. And this rule applies more strongly in

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Form of judge's order to change venue in vacation.

A. B. v. C. D. } Upon reading the affidavit of C. D., and the declaration in this cause, I order that the venue in this action be laid in the county of ——. Dated this —— day of ——, 1835. [*Judge's or Baron's signature.*]

Rule to retain the venue upon the usual undertaking.

A. B agst. C. D. } On —— the —— day of ——, A. D. 1835. Upon reading the rule [*or* "order"] made in this cause, on —— the —— day of ——, A. D. 1835; and the plaintiff *hereby undertaking* at the trial of this cause to give material evidence of some matter in issue arising in the county of ——, where the cause of action was originally laid, it is ordered that the said rule be discharged. Upon the motion of Mr. ——.

By the Court.

(*f*) 1 Cromp. 114; 2 Arch K. B. 4th ed. 825.

(*g*) See cases, 2 Arch. K. B. 825.

(*h*) *Keys* v. *Smith*, 2 Dowl. 210.

(*i*) Tidd, 9th ed. 612, 613; 2 Arch. K. B. 4th ed. 625, 626.

(*k*) *Curtis* v. *Drinkwater*, 2 B. & Adol. 169.

(*l*) *Lindley* v. *Bate*, 2 Tyr. 716.

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answer to an application before plea; thus, in an action for breach of covenant in a farming lease, although probably the question of breaches and damages would have to be proved by local witnesses from the county where the lands were situate, yet it might turn out otherwise, for the defendant might plead a release, and an issue thereon might as well be tried in another county. (m) At all events a special application cannot be made *until after plea.* (n) In a recent case, where the plaintiff knew that a special application would be made, (it having previously been refused, because it was made before plea and issue joined, and on such refusal leave was given to renew the application after issue was joined,) a learned judge, upon a special affidavit that there were twenty necessary witnesses to prove the defendant's set-off, who resided in Montgomeryshire, and that the defendant could not defray the expense of their travelling to Middlesex, where the venue was laid in Easter Term, 1835, changed the venue to Montgomeryshire, although it was sworn on behalf of the plaintiff that *his* witnesses were on their journey to town, and the trial would thereby be delayed till the long vacation. (o) Hence it seems always advisable for a defendant who resolves to try to change the venue, to give the plaintiff *the earliest written notice of that intention.* The same practice extends to indictments for misdemeanor, as for a conspiracy, in which the defendants cannot move to change the venue on the special ground that numerous necessary witnesses reside in another county until after plea and issue has been joined. (p) It seems questionable whether an application to change the venue in an indictment can be entertained after a special jury are struck, which jury of course would not try the indictment, if the trial were removed. (q)

There is it is true an instance of an application to change the venue on *special grounds,* (as in an action *for a libel,* on the ground that special pleas of justification *were about* to be pleaded, and that numerous witnesses lived in the county into which it was proposed to change the venue,) *even before actual pleading.* (r) But it seems now to be the established practice not to allow the venue to be changed *on special grounds* until *after the defendant has* pleaded; and in an action of covenant on a farming lease of land in Essex for breach of covenants relating to the cultivation of the land, the Court refused to allow the venue to

(m) *Maude* v. *Sessions,* 1 Cromp. M. & Ros. 86.

(n) *Cotterill* v. *Dixon,* 3 Tyr. 705.

(o) *Jones* v. *Gee,* 1 Harr. & Wol. 183.

(p) *Rex* v. *Forbes and others,* 2 Dowl. 440.

(q) *The King* v. *Tarpeley,* 1 Harr. & Wol. 58.

(r) *Robson* v. *Blackwell,* 2 Dowl. 651.

be changed from Middlesex to Essex before plea, because it did not follow that the defence or pleas referred to in the affidavit would afterwards *be adhered to*, and perhaps ultimately the defendant might plead a release, rendering all the suggested testimony of the supposed numerous witnesses useless. (*s*)

Requisite affidavit in support of a *special application*.

In support of a *special application* more particularity has of late been required than heretofore, (*t*) and *the affidavit* must state the nature of the action and where the facts occurred, and at all events that they arose in the county to which the venue is proposed to be removed, *and not elsewhere*. (*u*) It must also be sworn what pleas have been pleaded and what is the real defence intended to be tried, and the number of witnesses on the behalf of plaintiff as well as of the defendant, and that they are material and necessary, and that the defendant *intends to examine them* on the trial, and that they reside in the county named by the defendant, (*x*) together with every other local circumstance, as the custom or usage of the latter county, or the peculiar facts that might induce the Court to believe that the trial in the county named by the defendant will be more conducive to justice than if the action were tried in the county where the plaintiff originally laid his venue; and if it be the fact, the defendant may properly swear that his pecuniary circumstances will not enable him to bring the witnesses to London to try the cause there, according to the venue in the declaration. It seems also advisable in general to swear to a sufficient defence on the *merits*, though when facts are stated leading to that conclusion, the expressly swearing to merits may, it would seem, be omitted. (*y*)

Special rule nisi or summons.

Upon such special affidavit, a summons to show cause before a judge in vacation, or a rule nisi in term, must be obtained, which is to be served as other rules not requiring personal service; and the plaintiff, upon as full affidavits as he may be advised, may show cause, and an order or rule thereupon will be granted or refused.

Costs.

When on account of political excitement and other circumstances a fair trial cannot be had in the county where the

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(*s*) *Weatherby* v. *Goring*, 3 Bar. & Cres. 552; 5 Dowl. & Ryl. 541; *Bohro* v. *Sessions*, 2 Dowl. 699; *Maude* v. *Sessions*, 1 Cr. M. & Ros. 86; 4 Tyr. 275; but see the observations of Littledale, J. in *Parmeter* v. *Otway*, 3 Dowl. 69, 70.

(*t*) Per Littledale, J. in *Parmeter* v. *Otway*, Dowl. 69.

(*u*) *Palmer* v. *Terry*, 2 Dowl. 566; *Lancaster* v. *South*, 2 Tyr. 501; 2 Crom. & J. 659, S. C.

(*x*) *Crompton* v. *Stewart*, 2 Crom. & Jer. 473; *Tonks* v. *Fisher*, 2 Dowl. 23; *Parmeter* v. *Otway*, 3 Dowl. 66, 69; *Ladbury* v. *Richards*, 7 Moore, 82.

(*y*) *Johnson* v. *Nevison*, 2 Dowl. 260; *Johnson* v. *Berrisford*, 2 Cr. & M. 222, and per Littledale, J. in *Parmeter* v. *Otway*, 3 Dowl. 66; *Lancaster* v. *South*, 2 Tyr. 501; 2 Crom. & J. 659, S. C.

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venue has been laid by the plaintiff, the defendant may change the venue without immediately paying the costs, and they will be properly costs in the cause, in which case, if the plaintiff ultimately succeed, he will then get them, and if he fail, he would not have to pay them. (z)

(z) *Lewis* v. *Morris and another*, 2 Dowl. 60; *quære*, see *Cotterill* v. *Dixon*, *id.* 112.

CHAPTER XIX.

PROCEEDINGS BY A DEFENDANT BETWEEN DECLARATION AND PLEA, WHEN HE HAS NOT EVEN A PARTIAL DEFENCE.

CHAP. XIX. PROCEEDINGS BY A DEFENDANT, &c.

Subjects of this chapter.

If a defendant, after having taken advantage of every irregularity or availed himself of either of the proceedings considered in the last chapter, have no defence, legal or meritorious, and yet has *a cross demand*, he may then in some cases properly defend the action and proceed in his *cross action*, in order to set off *one judgment against the other;* but if he have no such cross demand, he then, if he have the immediate means, settles the action against him in those actions, when it is competent to do so, by *paying the debt and costs;* or if not able to do so immediately he endeavours to obtain *time by consent*, with or without *collateral security*, or by entering into a *rule of Court* for the payment of the debt and costs, or the debt only, by instalments; or he gives a *cognovit*, confessing that certain named damages have been sustained, and with or without a stay of execution; or he executes a *warrant of attorney*, with or without a *defeasance*, stating the agreed terms of indulgence if any; or the defendant agrees to withdraw his plea, or he neglects to plead in due time and *suffers judgment by default;* upon which, in an action of assumpsit or for damages, it is usual to execute a *writ of inquiry;* or if the action be on a bill of exchange or promissory note, or be covenant on a mortgage deed or for rent, the amount of the damages may be *referred to the Master* or one of the Prothonotaries. We will examine each of those proceedings in this chapter.

CHAP. XIX. I. DEFENDING PENDING A CROSS ACTION.

I. Of defending for time and prosecuting a *cross action* so as to set off the claim on one action against the other.

I. In an action for *a debt*, a cross *money* claim may be *set off* against the demand of the plaintiff, and if of equal amount, constitutes of itself, under a *plea* of set-off, a complete legal defence, and if not of equal amount, the difference may be paid into Court by the defendant, after which the action may be entirely resisted. But the cases to be noticed under this head are those where the cross claim of the defendant cannot legally be pleaded or taken advantage of as a set-off; in these cases, if the cross demands are *very considerable*, and the continuing solvency of the plaintiff be doubtful, so as to render it hazardous to pay his claim, and afterwards to seek to recover from him the amount of the defendant's claim, it may be advisable to defend the plaintiff's action *and to press on as rapidly as possible to judgment in a cross action;* because if judgment in the latter be obtained before the plaintiff can issue execution in his action, the Court will set off the two judgments against each other, and thus the defendant may avoid actual payment in money of more than the balance or difference, if any, between the two cross demands, &c.; (*a*) and we have seen that the Court of C. P. in one case *even stayed execution* in an action till judgment could be obtained by the defendant in his pending cross action, so as to enable him to *avail himself of and set off such judgment when obtained.* (*b*) But as it is but just that the respective attornies should be at all events paid the amount of their costs, the judgments are only to be set off subject to their lien, (*c*) except as regards collateral costs. (*d*) On this account, and as it follows that such costs must be paid to the respective attornies, at all events it is not the interest of either party when solvent, or when the claims are small, to incur the expense of such litigation; but it is advisable for a defendant to settle the claims on him, and *afterwards* commence his cross action, except in cases where a set-off can be legally set up as a strict and complete defence.

II. Of a motion or summons to stay proceeding on payment the *whole debt* and *costs.* (*e*)

II. In all actions for a mere *money demand* it has been usually supposed that a defendant may, *as of right*, move to stay proceedings on payment of the *full debt* claimed and costs. But this is not so; for the Court may, before making an order, im-

(*a*) *Ante*, vol. i. 667; Tidd, 9th ed. 991, 992.

(*b*) *Ante*, vol. i. 667, note (*s*); *Masterman* v. *Malin*, 7 Bing. 435.

(*c*) This now is so in all the Courts, Reg. Gen. Hil. T. 2 W. 4, reg. 93; *ante*, vol. iii. 607; *Dennell* v. *Hellyer*, 2 Dowl. 54; *Cowell* v. *Betteley*, id. 780. Notice of this rule was inadvertently omitted in the first edition of vol. ii. *ante*, p. 321.

(*d*) Reg. Gen. Hil. T. 2 W. 4, reg. 93; *ante*, vol. iii. 607, 608.

(*e*) See in general Tidd, 9th ed. 540 to 545; 2 Arch. K. B., 843 to 845; 833, 834, 836; Chitty on Bills, 8th ed. 599 to 601.

pose any reasonable terms; (*f*) and therefore where a defendant had moved to stay proceedings on payment of debt and costs, in order to proceed in a cross action for a claim he had on the plaintiff, a judge at *chambers*, and afterwards the Court, refused to stay proceedings unless upon the terms of allowing his cross demand to be set off and deducted, so as to render his cross action unnecessary and thus defeat the same.(*f*) So, although an acceptor cannot by direct adverse proceedings be compelled to pay more than the costs of the action against himself, yet, if pending actions against himself and other parties to the bill, he take out a summons to stay proceedings on payment of debt and costs, he will in general have to pay the costs of the action not only against himself, but also of the actions against the drawer and indorsers; (*g*) and when those are considerable, the best course for an acceptor may be to suffer judgment by default, in which case he can only be compelled to pay the principal and interest, and the costs of the action against himself.(*h*) When however an acceptor has tendered the debt and costs at an earlier stage, and the plaintiff's attorney *afterwards* improperly commenced actions against the drawer and other parties, the Court stayed the proceedings on payment of the costs of that action only. (*h*) And the Court or a judge will not at the instance of *the plaintiff* make an order in an action on a bill against an alleged acceptor to stay proceedings without costs, or generally on the ground that the drawer has paid the bill, if the defendant acceptor contest his liability and insist on trying the action against him, in order to recover the costs of his defence. (*i*)

Upon a summons to stay proceedings upon payment of a named sum and costs, if the plaintiff insist that more is due, the judge cannot make an order, and then the only course is to pay the sum into Court under the usual rule for that purpose, noticed in the next chapter. (*k*) In that case, if the plaintiff should afterwards take the money out of Court and discontinue, he will only be entitled to costs up to the time of the first offer, and not to any subsequent costs, although he suggest as a reason for not proceeding further, that he could not find a material witness; (*l*) but if the plaintiff show that really

(*f*) *Jones* v. *Shepherd*, 3 Dowl. 421.

(*g*) *Id. ibid.*; Chitty on Bills, 8th ed., 599, 600; but see exception, *Hodson* v. *Gunn*, 2 Dowl. & Ry. 57.

(*h*) *Id. ibid.*; *The King* v. *Sheriffs of London*, 2 Bar. & Ald. 192; but see exception in *Hodsm* v. *Gunn*; 2 Dowl. & Ry. 57, and *Carne* v. *Legh*, 6 Bar. & Cres. 124; 9 Dowl. & R. 126.

(*i*) *Lewis* v. *Dalrymple*, 3 Dowl. 433.

(*k*) And see 2 Arch. Prac. K. B. 833, 834, 836.

(*l*) *Hale* v. *Baker*, 2 Dowl. 125; *ante*, vol. iii. 281, qualifying *Edwards* v. *Harrison*, 11 Price, 533.

CHAP. XIX. II. PAYING DEBT AND COSTS.

more was due, and yet assign a sufficient reason for not proceeding, it would be otherwise.

In actions for *general damage*, as replevin after an avowry for a distress damage feasant, or in an action of trespass or trover, a defendant cannot *stay the proceedings* by any payment into Court, (m) though under the 3 & 4 W. 4, c. 42, sect. 21, noticed in the next chapter, by leave of a judge, a sum of money to cover the supposed damages may *in all personal actions*, except for injuries to the *person*, be paid into Court, after which the plaintiff would proceed at the peril of having to pay costs, if he do not recover a verdict for larger damages.

III. Of voluntary adjustments of an action enforced by a rule of Court.

We are now to suppose that there is no defence, nor cross demand, but that the defendant is unable *immediately* to pay the debt and costs. In this case, unless the plaintiff or his attorney will *concur* in terms of settlement, the superior Courts have no power to *compel* a stay of the proceedings in an action on any terms however reasonable, excepting those of *immediate payment* of the *debt and taxed costs;* and we have seen that neither a judge at chambers nor the Court in banc can (except by consent) make an order or rule to stay proceedings on payment of the debt and costs by monthly or other *instalments;* (n) and yet as regards an immediate execution after a trial, the 1 W. 4, sect. 1, c. 7, sect. 2, appears to give a judge at nisi prius authority to direct execution to issue at *such time* as he shall think fit for a *part or the whole*, and subject *to any condition or qualification.* In practice many cases occur where it would be salutary if a judge had power to stay proceedings on the defendant giving ample security by deposit of goods or documents, but no such power exists; (o) and hence defendants are frequently induced to gain time, so as to obtain funds, either by a motion for some supposed irregularity, or by false pleading, or by some other of the few dilatory expedients still in some cases available.

Supposing, however, that terms of arrangement can be *agreed upon*, without the defendant's executing a cognovit or

(m) Tidd, 9 ed. 544, 545.

(n) *Kirby* v. *Ellier*. 2 Cromp. & M. 315; *ante*, vol. iii. p. 32.

(o) Most of the Court of Request acts give the judges of those Courts' jurisdiction full powers in this respect. Lord Wynford's suits-at-law-bill, ordered to be printed, 28 Feb. 1833, contained a clause enabling a defendant to take out a summons to stay proceedings on payment of debt or delivery up of possession of house, lands, or goods, at such time as a judge should order, and the judge was authorized to make *an order* on security *satisfactory to him, and to be complied with within three months.* But that bill was opposed by Lord Eldon and Lord Lyndhurst, and negatived on the second reading without a division, in April, 1833; but *semble* that such an enactment would be salutary.

CHAP XIX. III. ADJUSTMENT BY RULE OF COURT.

warrant of attorney, or actually suffering judgment by default, the performance may be effectually secured, not only by deposit of or by direct charges upon, or assignments of property, or other collateral securities, but also by a *rule of Court*, in which such terms may be embodied; and this may in some cases constitute a preferable security even to a *judgment:* for where a defendant had agreed to pay a weekly sum, which was to be increased on a contingency, and the stipulation had been made a *rule of Court*, it was held that the defendant's discharge under the Insolvent Act, 7 G. 4, c. 57, s. 50, 51, did not extend to subsequent accruing payments, and that an *attachment* might issue for the non-payment; though if, instead of the rule of Court, a judgment had been obtained, it would have been otherwise. (*p*) And where a defendant in an action for verbal slander, after notice of trial, signed a paper, in which, after reciting that the plaintiff had consented, on the defendant's paying the costs and making an apology, to stay proceedings, and the defendant made such apology, it was held that this was a positive undertaking by the defendant to pay the costs, and that as the plaintiff had stayed the proceedings, the Court would by rule and attachment enforce the defendant's agreement to pay the costs, although the written undertaking had not expressly stipulated that it might be made a rule of Court. (*q*) And where an attorney in that character gives an undertaking in a cause to pay money, or do other act, performance may be enforced by summary motion, although perhaps an action might not be sustainable for breach of the engagement, on account of its not expressing the consideration pursuant to the statute against frauds. (*r*)

Caution to be observed by plaintiff and his attorney in giving time.

In bailable actions, and in cases of indorsed bills of exchange and promissory notes, or where a *third person* may be *surety* for the defendant, a plaintiff and his attorney must take care that before either consents *to give time or indulgence* in an action beyond the time which the defendant would obtain by the ordinary course, the bail, as *such* surety, or other responsible third party, expressly consent to the time or indulgence being given, and that the same shall not prejudice the

(*p*) *Lawrence* v. *Walker*, 1 Harr. & Woll. 205; 3 Dowl. 614.

(*q*) *Tardrew* v. *Brook*, 5 Bar. & Adol. 880, where see the form of undertaking; but it is recommended to adopt more express terms of agreement, as well to apologise as to pay costs, and at least that the latter engagement shall be made a rule of Court, and the costs taxed as between attorney and client.

(*r*) *Ante*, vol. ii. 339, 310; *Evans* v. *Duncombe*, and *In re Greaves*, 1 Cromp. 372 to 376; *Hall* v. *Ashurst*, 3 Tyr. 420, and see *Ex parte* v. *Gardiner*, 2 Dowl. 520; when not, *Ex parte Gardiner*, 9 Legal Obs. 331.

CHAP. XIX. III. ADJUSTMENT BY RULE OF COURT.

claim against them; for otherwise they would, or at least might be discharged from liability, on the ground that any such indulgence may induce the principal debtor to relax his exertions to pay the debt, on relief of the ultimate liability of his bail or of sureties, and perhaps may in the interim prefer and pay other more pressing claimants. (s) It would be advisable always to have a written stamped agreement to this effect, and that the fresh security express that it is accepted at the request of the bail or surety, testified by his subscribed signature.

IV. *Of Cognovits* and proceedings thereon. (t)

When a writ has already been issued against a defendant, a *cognovit actionem*, or in other words, a written confession of the action, subscribed by the defendant but not sealed, and authorizing the plaintiff to sign judgment and issue execution usually for a named sum, is a very usual mode of saving the expenses of further proceedings in an action: though when no writ has been issued, the more usual security, having the same effect, is a *Warrant of Attorney*. When a party is a *trader*, subject to the bankrupt laws, there is a distinction between a cognovit and a warrant of attorney, materially in favour of the former, viz. that a fieri facias founded on a *warrant of attorney* may be defeated by a commission or fiat issued within two calendar months afterwards, unless an act of sale under such fi. fa. has taken place; (u) whereas the 1 W. 4, c. 7, sect. 7, reciting that by an act passed in 6 G. 4, c. 16, sect. 108, it was provided that no creditor for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors; and whereas by reason of such provision, plaintiffs have been and may be deterred from accepting a cognovit actionem with stay of execution, whereby the expense of further proceedings in such action might have been and may be saved or diminished, for remedy thereof it is enacted, "that no "judgment signed, or execution issued after the passing of "this act, on *a cognovit actionem signed after declaration* or "delivered, or judgment by default, confession or nihil dicit, "according to the practice of the Court, in any action *com-"menced adversely and not by collusion, for the purpose of*

(s) See the cases as to *bail* being discharged, Tidd, 9th ed. 295; *ante*, vol. i. 128, 129; Chitty on Bills, 8th ed. 441, 456.

(t) As to cognovits in general, see Tidd, 9th ed. 559 to 562; 2 Arch. K. B. 4th ed. 562; *ante*, vol. ii. 335.

(u) 6 G. 4, c. 16, s. 81 and 108; *Godson* v. *Sanctuary*, 1 Nev. & Man. 52; 4 Bar. & Adol. 255, S.C.; *Crosfield* v. *Stanley*, 4 Bar. & Adol. 87.

"*fraudulent preference*, shall be deemed or taken to be within "the said provision of the said recited act." So that now a judgment on a *cognovit*, provided it be given *after the declaration* has been filed or delivered, and without express intent to give a fraudulent preference, is not affected by the 6 G. 4, c. 16, s. 108, and has all the advantages in that respect as an adverse judgment after verdict. We have considered the recent General Rule of Hil. T. 2 W. 4, reg. 72, as to the requisites of cognovits as well as warrants of attorney executed by a *prisoner* or person in actual custody.(*x*) And where a cognovit was given by a defendant against whom a writ had been issued, and who from the conduct of the parties was led to believe he was under duress, no attorney being present, it was set aside, though it was positively denied that he was in custody, or that a warrant had been issued against him.(*y*) That part of such rule that requires the attorney to *declare* himself to be an attorney for the defendant, and state that he subscribes as such, has been construed to mean that such declaration and statement should be *in writing*;(*z*) and a form of such declaration has been suggested in a previous page, and will be found in a subscribed note.(*a*) Before, however, a defendant executes a cognovit, naming the amount of the supposed debt, he should carefully ascertain that it does not exceed the *real debt*, for the Court will not allow a subsequent inquiry, nor can the legality of the transaction be afterwards so readily impeached as a warrant of attorney in general may be.(*b*)

Time of giving a cognovit.

With respect to the *time* of giving a cognovit, although regularly, from the very nature of the instrument, and from its being properly an admission of the statement in the plaintiff's declaration, and should therefore strictly not precede it, (and when the defendant is a trader this may be essential under the above statute,) yet it has long been held that a cognovit before declaration is valid; (*c*) and it has even been held that it may be given after process has been issued, and before it has been served; (*d*) or even before any process, or at least before filing a bill against an attorney; (*e*) nor is it even essential to declare

(*x*) *Ante*, vol. ii. 335.

(*y*) *Turner* v. *Shaw*, 2 Dowl. 244; and see *Fisher* v. *Nicholas*, *id.* 251; 2 Cro. & M. 215.

(*z*) *Fisher* v. *Nicholas*, 2 Crom. & M. 215; 2 Dowl. 251; and see *Bligh* v. *Brewer*, 1 Crom. M. & Ros. 651; 3 Dowl. 266, as to what is a sufficient compliance.

(*a*) *Ante*, vol. ii. 335, note (*r*), and see form of cognovit, *infra*, 666.

(*b*) *Bligh* v. *Brewer*, 3 Dowl. 266.

(*c*) *Morley* v. *Hall*, 2 Dowl. 494; *Clarke* v. *Jones*, 3 Dowl. 277, 278; *Davis* v. *Hughes*, 7 T. R. 207, note (*a*).

(*d*) *Kirby* v. *Jenkins*, 2 Tyr. 499; *Bligh* v. *Brewer*, 3 Dowl. 266.

(*e*) *Davis* v. *Hughes*, 7 T. R. 207, as observed upon by Taunton, J. in *Morley* v. *Hall*, 2 Dowl. 495.

CHAP. XIX. IV. OF COGNOVITS.

before judgment is signed on a cognovit. (*f*) It also, though only by leave of a judge of the Court, may be given after plea, and in that case Reg. Gen. Hil. T. 2 W. 4, reg. 100, orders that "Where the defendant, after having pleaded, is allowed "to *confess the action*, he may withdraw his plea *in person*, "without the appearance of the attorney or his clerk for that "purpose, before the officer of the Court;" which rule assimilated the practice of K. B. and Exchequer to that of C. P. (*g*)

Terms of cognovit, when payable by instalments.

If the debt or costs are to be paid by instalments, and the agreement of the parties is, that the plaintiff shall *not* be at liberty, in case of one default, to issue execution for the whole, care must be observed, on the part of the defendant, so to express the agreement, for otherwise the plaintiff may issue execution for the whole; as where the cognovit was in these words:—"I confess this action and that the plaintiff hath suffered damages to the amount of £50, besides his costs and "charges to be taxed, but no judgment is to be signed, or "execution issued, unless default shall be made in payment of "£25, together with the aforesaid costs, by instalments of 10*s*. "each calendar month, the first thereof to be payable on the "14th day of June next, and a similar one on the 14th day of "each succeeding month, till the whole be paid. Dated." It was held that on any default the plaintiff might sign judgment and issue execution for the whole of the debt and costs remaining unpaid; (*h*) a comprehensive form of cognovit is given in the note. (*i*)

(*f*) *Morley* v. *Hall*, 2 Dowl. 494.

(*g*) Tidd, 560; Imp. K. B. 10th. ed. 422; Imp. C. P. 340.

(*h*) *Rose* v. *Tomlinson*, 3 Dowl. 49.

Full form of a cognovit, the whole debt payable on one day, with suggested stipulations as to sale, &c.

(*i*) In the K. B., [*or* "C. P." *or* "Exchequer of Pleas."]

Between { A. B. Plaintiff, and C. D. Defendant.

I confess this action, and that the plaintiff hath sustained damages to the amount of £——, [*usually the damages laid in the declaration, so as to authorize a judgment sufficient to cover all contingencies,*] besides his costs and charges to be taxed by the Master, [*or in C. P.* "by one of the Prothonotaries," *or if already taxed or agreed upon as is desirable to save time and expense, say,* "to the amount of £——,"]* And in case I shall make default in payment of the sum of £——, [*the real debt,*] being the actual debt in this action, together with the said costs, on the —— day of —— next, the plaintiff is to be at liberty to enter up judgment for the said sum of £——, [*the first sum confessed, or if in debt, and the whole debt be confessed, then say,* "the said debt,"] together with all interest justly payable in respect thereof, and the said costs, and to sue out execution thereon for the said sum of £——, [*the real debt,*] and interest, and the said costs; and also for the costs of entering up such judgment, and of suing out execution thereon, officer's fees, sheriff's poundage, possession-money, expenses of private or public sale, costs of levying, and all other incidental expenses; and also that it shall be lawful for the said plaintiff and his attorney and the sheriff and his officers to continue in possession a reasonable time in or upon any messuage, buildings, land or premises in my possession for the purpose of there preparing for sale and selling of my goods and chattels taken in execution in this action. And I do hereby undertake not to bring any writ of error, or file any bill in equity, nor make

When a cognovit or warrant of attorney, payable by instalments, authorizes successive executions for each instalment as it becomes due, then the plaintiff may charge the defendant in execution for each of the defaults accordingly, without any previous application to the Court for leave.(*k*) If a cognovit stipulate "not to bring a writ of error, or delay execution," although it do not contain an express release of errors, nor is under seal, yet if the defendant afterwards, contrary to good faith, issue a writ of error, the plaintiff may treat it as a nullity, and it is no supersedeas.(*l*) It seems advisable to fix the amount of the costs in the cognovit, by which the necessity for giving a day's notice of taxing the costs and of apprizing the defendant of the intention to issue execution is avoided.(*m*)

Defeasance.

The 3 G. 4, c. 39, s. 4, enacts, "that if a cognovit or warrant of attorney *shall be given*, subject to any *defeasance* or condition, such defeasance or condition shall be written on the *same paper* or parchment on which such cognovit or warrant of attorney shall be written, before the time when the same or a copy thereof respectively shall be filed, otherwise such cog-

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any application to any Court or judge in this action, nor do any other matter or thing whereby the plaintiff may be delayed in entering up his judgment, or suing out execution thereon, or selling under the same as aforesaid, and it any such proceeding should be had by me contrary to this stipulation, I will pay all the costs thereby incurred, and that no such proceeding shall have any effect whatever, and the said plaintiff may plead my release of any supposed error. And that it shall not at any time, or in any event be necessary, previous to issuing the said execution, to revive the said judgment, or to sue out or to execute any writ of scire facias. And that it shall be lawful for the plaintiff to have in force at the same time several writs of execution in different counties. Dated this —— day of ——, A. D. 1835. C. D.

Witness, Y. Z., [*or if executed by a defendant whilst in custody, then in pursuance of the above Reg. Gen. Hil. Term*, 2 *W.* 4, *Reg.* 72, *let the attestation be thus.* See *Fisher* v. *Nicholas*, 2 Crom. & M. 215; 2 Dowl. 251.]

"Signed, sealed, and delivered by the said C. D., in the presence of me Y. Z., being an attorney of the Court of ——, expressly named and requested by the said C. D. to attend as his attorney before and at the execution hereof, and to witness his execution hereof as his attorney, and I having before the said C. D. executed the same, duly informed the said C. D. of the nature and effect of this instrument, and I subscribe this attestation as such attorney, and for the said C. D., and at his request, in pursuance of the rule of Court in that behalf. Y. Z."

The like, where the debt is to be paid by instalments, and execution to issue for the whole on one default.

[*Same as the above to the asterisk and then as follows.*]

Which said costs are to be paid on the —— day of —— next, and which said debt of £—— is to be paid by the instalments following, that is to say, £—— on the —— day of —— next, £—— on the —— day of —— next, and £——, the residue of the said debt, is to be paid on the —— day of ——, A. D. 1836. And if default shall be made in payment of the said costs, or of either of the said instalments, or any part thereof, then execution may issue for the whole of the said costs and debt *then remaining unpaid*, together with the costs of entering up judgment, &c. [*Same as the last to the end.*]

The like, when execution is only to be issued from time to time, for the instalment that *has become due.*

[*Same as the last, but in lieu of the words,* "then remaining unpaid," *say*,] then execution may from time to time issue for so much of the said costs and instalments as shall, according to the said stipulation and times of payment aforesaid, *have become due and payable*, together with the costs of entering up judgment, &c. [*Same as the first form to the end.*]

(*k*) *Davis* v. *Gomperts*, 2 Dowl. 407.

(*l*) *Best* v. *Gompertz*, 2 Cr. & M. 427.

(*m*) *Griffiths* v. *Liversedge*, 2 Dowl. 143.

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novit or warrant of attorney shall be null and void, to all intents and purposes." But this only means void as to assignees of bankrupts and creditors, and does not defeat the validity of the instrument as between the plaintiff and the defendant.(n)

Stamp.

A mere cognovit does not require any stamp,(o) but if it be of the value of £20 or upwards, and contain any terms of agreement, as if it be payable by instalments, and implies an agreement to wait accordingly,(p) it must be stamped as an agreement, and which it may, like other agreements not under seal, be within twenty-one days after it is executed without payment of any penalty, and at any time afterwards on payment of the duty and £5 penalty. But a stipulation in a cognovit not to take advantage of its having been given before declaration does not render a stamp necessary.(q) And if the plaintiff's attorney write a memorandum on a *separate* paper, not intended as a defeasance, but merely for the satisfaction of a defendant, stating that the cognovit is not to be put in execution for a fortnight, that does not render a stamp necessary.(r) On this account, to save expense, it may be advisable to draw up a cognovit without any terms of agreement, and merely to give him on a separate paper a memorandum of the terms, upon performance of which he will avoid execution.(r) Rules nisi have been granted and made absolute on the ground that a cognovit is not duly stamped;(s) but as a proper stamp may be impressed before showing cause, such a motion will not, in general, be of any ultimate avail.(t) And the Courts of law as well as of equity will enlarge the hearing of a rule so as to afford an opportunity of getting the proper stamp impressed.(u) And in a late case a rule nisi to set aside a cognovit was refused, because that objection would be of no avail, as the plaintiff might get it stamped before he could be required to show cause.(x) The practice, however, in general, is to grant a rule nisi, so that the Courts may not permit the evasion of the stamp duty. If a rule for setting aside the proceedings on a cognovit be made absolute, on the ground that it was not duly stamped, the cognovit is nevertheless to remain on the file, or in the plaintiff's possession, and after getting the document

(n) *Bennett* v. *Daniel*, 10 Barn. & Cres. 500.

(o) See observation of Taunton, J., in *Morley* v. *Hall*, 2 Dowl. 497.

(p) *Pitman* v. *Humphrey*, 2 Tyrw. 500.

(q) *Green* v. *Gray*, 1 Dowl. 350.

(r) *Morley* v. *Hall*, 2 Dowl. 497. If it were intended as a defeasance, then, if not written on the cognovit itself, the latter would be void as against creditors, by 3 G. 4, c. 39, s. 4, *Bennett* v. *Daniel*, 10 Bar. & Cres. 500.

(s) *Pitman* v. *Humphrey*, 2 Dowl. 500.

(t) *Rose* v. *Tomblinson*, 3 Dowl. 49.

(u) *Doe* v. *Roe*, 5 Bar. & Ald. 768; 1 Dowl. & Ryl. 433.

(x) *Clarke* v. *Jones*, 3 Dowl. 277, 278.

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duly stamped, he may again sign judgment and issue execution, and the costs of the first rule may be set off against the debt and costs, subject to the attorney's lien.(y) But where a prisoner applied without adequate ground to set aside proceedings on a cognovit because it was not stamped, the Court discharged the rule without costs, because it had been made by a man struggling to obtain his liberty.(z)

Cognovit to be filed within twenty-one days.

The 3 G. 4, c. 39, s. 3, enacts that every *cognovit* given in the Court of K. B., or a true *copy* thereof, if given in any other Court, shall, together with an *affidavit* of the time of the execution thereof, be *filed* as therein directed, *within twenty-one days* after such cognovit shall have been executed, otherwise the same shall be void against the assignees if the defendant become bankrupt. But it is settled that the cognovit continues valid against the defendant himself.(a)

Cognovit discharged by bankruptcy and certificate.

At one time it was decided that a creditor who had a cognovit, upon which he had not signed judgment, had a preferable security; because he might elect in case of bankruptcy to prove the original debt, or sign judgment, although the defendant had obtained his certificate.(b) But it has recently been decided that where a defendant gives a cognovit for debt and costs, although as between attorney and client, and before judgment signed becomes a bankrupt, his certificate is a bar to the plaintiff's claim.(c)

V. Of Warrants of Attorney.

We have already stated the recent rules and decisions relating to *warrants of attorney*.(d) The preceding practice has been very fully considered in the best works;(e) and many of the observations relating to *cognovits* will here apply.

A warrant of attorney is usually an authority under seal to certain attornies named therein, to appear for the defendant in a named court, (*though it is advisable to authorize the judgment in either Court*), and to receive a declaration therein in an action of *debt* for a fixed sum (*sufficient to cover a principal debt and interest*,(f)) as due upon an account stated, (*though sometimes the bond, or other subsisting security, is injudiciously named; but which should be reserved, and kept on foot as a distinct and not merged security;*) and thereupon to *confess* the same action, or else to suffer a *judgment* by nil dicit, or otherwise, to pass against the party; and that thereupon *exe-*

(y) *Pitman* v. *Humphrey*, 2 Dowl. 500.
(z) *Morley* v. *Hall*, 2 Dowl. 497.
(a) *Bennett* v. *Daniel*, 10 Bar. & Cres. 500.
(b) *Wyborne* v. *Ross*, 2 Taunt. 58.
(c) *Metcalf* v. *Watling*, 2 Dowl. 552, overruling *Wyborne* v. *Ross*.
(d) *Ante*, vol. ii. 333 to 337.
(e) Tidd, 9th ed. 545 to 550, and 2 Arch. K. B. 569 to 581.
(f) *Davison* v. *Overend*, 6 Car. & P. 222, 224.

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cution may issue for the said sum of £—— (*the nominal debt,*) together with the costs of suit, and all other reasonable and incidental costs and charges attending the said judgment and execution and sale. And then follows a release of errors, and on that account the party seals and delivers this instrument as a deed; and a *defeasance*, stating the times of payment, &c. is usually subscribed, and signed by both parties.

A warrant of attorney is more frequently given independently of any action, and very generally as a *prospective* security, and although at the time it is executed nothing is due from the party. It is in that respect a convenient collateral security to bankers and others, in consideration of their agreeing to make pecuniary advances, or to suffer a customer to overdraw his account, or a traveller or other agent from time to time to receive monies on account of a principal.

We have seen that when a party giving a warrant of attorney is a *trader*, liable to the *bankrupt law*, an execution founded upon the same is liable to be defeated under 6 G. 4, c. 16, s. 108; and therefore in a case of that nature the better course is to issue a writ for any sum actually due, and to declare as soon as practicable, and afterwards to obtain a cognovit, which cannot then be impeached by the assignees or creditors.(g) And an execution upon a warrant of attorney is invalid, if the levy be made after the commencement of an *insolvent debtor's* imprisonment.(h)

The recent alterations in the practice as to warrants of attorney are but few. We have seen that Reg. Gen. Hil. Term, 2 W. 4, reg. 72, requires the presence of an attorney, particularly named by a party who executes the same *whilst a prisoner*, and also requires a particular written form of attestation;(i) and reg. 73 orders that "leave to enter up judgment "on a warrant of attorney above one and under ten years old, "must be obtained by a motion in term, or by order of a judge "in vacation, and if ten years old or more, upon a rule to show "cause."(j)

Where a female gives a warrant of attorney before she marries, it is necessary to obtain leave of the Court to enter up judgment against her and her husband.(k)

If by the terms of the defeasance a demand is to precede judgment or execution, it must be made.(l) The subscribing

(g) *Ante*, 664.
(h) *Kelcey* v. *Minter*, 1 Bing. N. C. 721.
(i) *Ante*, 665.
(j) See the former practice, Tidd, 9th ed. 552, 553; Jervis's Rules, note (w).
(k) *Staples* v. *Purser and wife*, 3 Moore & Scott, 800; and 2 Dowl. 764, S. C.
(l) *Capper* v. *Dando*, 1 Harr. & Wol. 11; 4 Man. & Nev. 335, S. C.

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witness to a warrant of attorney must in general make affidavit of the execution; and his signing the jurat of the affidavit as the commissioner before whom it is sworn is not sufficient.(m) But where an attesting witness to an old warrant of attorney is abroad, his affidavit need not be produced; and it then suffices to produce the affidavit of the plaintiff himself, stating the facts.(n) But such affidavit in support of a motion for leave to enter up judgment on a warrant of attorney given when no action was depending, should *not be intituled* in any cause.(o) And affidavits to enter up judgment upon a warrant of attorney need not now, as heretofore was requisite, swear that the party was alive in the full term.(p) And if the defendant be resident in the West Indies, then an affidavit of his having been seen alive within four months suffices.(q) As respects the continuing existence of the debt, the plaintiff's attorney, who had always managed the plaintiff's money concerns, is competeut to swear to such debt.(r) With respect to stipulations that the debt or costs shall be payable by *instalments*, the decisions relative to cognovits are equally applicable to warrants of attorney.(s) It has been held, that as each instalment becomes due the defendant may repeatedly be taken in execution, though discharged as to the first execution.(t) If a bankrupt, after he has obtained his certificate, execute a warrant of attorney, it may be enforced against him.(u)

VI. Judgment by *Default*.

When a defendant has no defence, either on the *pleadings* or the *law* or *merits*, and he has no cross action to set off, nor the means of immediately paying the debt and costs, nor can obtain time on the terms of his entering into a *rule* to pay by instalments, or giving a *cognovit* or *warrant of attorney* as above suggested, then, to prevent a greater increase of costs *by pleading and trial*, he should omit pleading in due time, i. e. within the limited times before stated, or extended time obtained from a judge;(x) or if under terms of pleading issuably, &c. he sometimes pleads a plea not strictly issuable, but inviting a demurrer, and thereupon the plain-

(m) *Field* v. *Beacroft*, 2 Tyrw. 283; 2 Cromp. & J. 217, S. C.

(n) *Taylor* v. *Leighton*, 3 M. & Scott, 423; 2 Dowl. 746.

(o) *Davis* v. *Stanbury*, 3 Dowl. 440.

(p) *Cookman* v. *Hellyer*, 1 Bing. N. C. 3; 2 Dowl. 816, S. C.; *Robinson* v. *Lesle*, 3 Dowl. 531.

(q) *Fursey* v. *Pilkington*, 2 Dowl. 452.

(r) *Ashman* v. *Bowdler*, 2 Cromp. & Jerv. 212.

(s) *Ante*, 666.

(t) *Atkinson* v. *Baynton*, 1 Hodge's R. 7; *Davis* v. *Gompertz*, 2 Dowl. 407.

(u) *Duncan* v. *Sutton*, 1 Bing. N. C. 431.

(x) If the declaration be so defective, that a judgment by default *would* not aid it, then when defendant wants time it may be advisable in such a case to suffer judgment by default, and afterwards to move in arrest of judgment, or bring a writ of error; for by pleading, the effect of the objection may be removed.

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tiff having previously given notice to plead and demand of plea when necessary, and not having *received* a plea in due time, and which must now in all cases be *delivered*, he signs judgment by *nil dicit*, that is for default of a plea. Afterwards, if the action be in *debt*, the plaintiff may *immediately* issue execution; a circumstance which will obviously induce a defendant's attorney in general to avoid suffering judgment by default in that form of action. But if the action be in *assumpsit*, except on a bill of exchange or note or check, or in *covenant*, (except for rent or for mortgage money), or in *case*, *replevin*, *trover*, or *trespass*, the plaintiff must by *writ of inquiry* ascertain and fix by the *inquisition* of a sheriff's jury the amount of the damages; though when an action of assumpsit is on such *bill*, *note*, *or check*, or an action of *covenant* is for *rent or mortgage money*, then the amount of damages may, by a long established practice, be *referred to the master;* and upon the return of the inquisition or master's assessment, final judgment is to be signed for the sums thus differently ascertained and costs, and *execution* issues. (y) The former practice relative to judgments by default and writs of inquiry, and other proceedings thereon, is fully stated in the works on practice previously published, and will not here be repeated; (y) and we shall therefore here only add a few observations, and state the few recent enactments, rules, and decisions upon the same.

General observations on judgments by default.

Judgment by *default* may be signed not only in consequence of no plea whatever having been delivered, but also in consequence of such plea when necessary not having been signed by counsel, or that the defendant having been subjected to the terms of pleading issuably, has pleaded a plea that is deemed not issuable within those terms. The cases when or not a judgment may be signed in respect of either of these defects in the plea will be more properly examined when we in a following chapter consider the requisites of pleas. Two points however may be anticipated, viz. that notwithstanding the plea may be defective, and indeed a nullity in respect of one of the defects alluded to, still the same may not dispense with the necessity for a regular notice to plead, rule, and demand, nor will the plaintiff be entitled to sign judgment until he has waited the full time for pleading regularly; because the defendant may perhaps discover his error, and before the time for signing judgment deliver a correct plea. (z) So if in an

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(y) Tidd, 9th ed. 562 to 570; 2 Arch. Prac. K. B. 4th ed., 582 to 611.

(z) *Nollekins* v. *Severn*, 2 Crom. & Jer. 333; Arch. K. B. 4th ed. 241.

action of debt the defendant plead the general issue as to a part, and as to the residue a tender, but omit to pay the money alleged to have been tendered into Court, judgment cannot on that account be signed as for want of a plea to the *whole* declaration; though if the plea of tender had extended to the whole it might have been so; but the judgment at most should have been signed as to the sum named in the plea of tender; and the Court set aside the entire judgment as irregular.(*a*)

The suffering judgment by default, (excepting in an action of debt,) only admits the precise allegation in the declaration, and that *something* is due or claimable. Thus it admits that an agreement or contract, as stated in the declaration, was made and signed, and is duly stamped, and that the plaintiff at least in part performed it, so as to be entitled to recover, but unless in cases of precise fixed claims, it leaves the defendant to dispute the goodness or value of the work done or goods delivered. And where the declaration is general, as for work and labour and materials, the defendant, on a judgment by default, is at liberty to cross examine the plaintiff's witnesses, who are called to prove the work done, as to whether the work sworn to by them was or was not done on the defendant's retainer, and the under-sheriff having refused to permit such cross-examination, the inquisition was set aside; Parke, B. observing, "the undersheriff was mistaken; a judgment by default admits "*something* to be due but *disputes* the *amount*; the question "therefore was properly put,"(*b*) and at least after notice from the defendant of his intention to dispute the value of work done, he may, on executing an inquiry, prove that the same was improperly done, and not according to the contract, so as to reduce the plaintiff's claim to the real value, although the declaration was special. (*c*) Hence it seems that in an action of assumpsit for goods sold, or work done and materials found on various occasions, a plaintiff is not in strictness by a judgment by default relieved from the necessity of proving the delivery of each article, or the extent of the work, done, though certainly in practice, when a defendant has not by plea denied the plaintiff's action, there is a strong feeling on the part of the jury, when executing a writ of inquiry, to be satisfied with slighter evidence than on a trial.

In consequence, however, of the strict necessity for proving each item of claim on an inquiry in an action of assumpsit,

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(*a*) *Chapman* v. *Hicks*, 2 Dowl. 641.
(*b*) *Williams* v. *Cooper*, 3 Dowl. 204.
(*c*) *Chapel* v. *Hickes*, 2 Cromp. & M. 214.

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which is avoided in an action of *debt*, it is advisable, when practicable, to adopt the latter form of action. It has been recently held, that a judgment by default may be signed on such a holiday as has merely been established for the relief of the officers, but who may still waive the day of leisure. (*b*)

Utility of plea of non assumpsit, except as to the sustainable part of plaintiff's claim, and letting the plaintiff take judgment by nil dicit in part. (*c*)

When a defendant in an action of assumpsit, or covenant, is not prepared to pay the money into Court, and the declaration contains not only the recoverable claim, but also others clearly not sustainable, then it may be advisable to plead only to the latter, and let the plaintiff sign judgment by default as to the former, in which case the plaintiff must either enter a nolle prosequi as to the unsustainable part of his claim, or will proceed to issue and trial at the peril of costs as to the latter; or the defendant may, to avoid the costs of an inquiry, confess the action as to part, and as to named damages, and plead as to the residue; but then immediately execution for the sum confessed might issue.

Recent enactments by 1 W. 4, c. 7, that writs of inquiry may be returnable in *vacation*, and *immediate* judgment and execution had, *unless*, &c.

The principal and most important recent regulation respecting judgments by default and writs of inquiry is, that in 1 W. 4, c. 7, sect. 1, which *after reciting* that the judgment and executions in actions brought in the Courts of law at Westminster, are often delayed by reason of the interval between the terms, enacts, "that any *writ of inquiry* of damages to be issued " as or by either of those Courts, by whatever form of process " the action may have been commenced, (*d*) may be made *re-* " *turnable and returned on any day certain in term or vaca-* " *tion*, to be named in such writ, and thereupon at the return " thereof a rule for judgment may be given, (*e*) costs taxed, " final judgment signed, and execution issued forthwith, *unless* " *the sheriff* or other officer before whom the same may be ex- " ecuted, shall *certify* under his hand upon such writ, that " judgment ought not to be signed until the defendant shall " have had an opportunity to apply to the Court to set aside " the execution of such writ, or one of the judges of the said " Courts shall think fit to order the judgment to be stayed until " a day to be named in such order: Provided always, that in " case the signing of judgment on such writ shall be postponed

(*b*) *Bennett* v. *Potter*, 2 Crom. & J. 622.

(*c*) And see forms of pleas, 3 Chitty on Pleading, 5th ed. 909 and 1030 *a*, 6th ed.

(*d*) *Semble*, therefore this enactment *extends to actions removed* into either Court at Westminster, though not commenced there.

(*e*) Since rendered unnecessary by the Reg. Gen. Hil. T. 2 W. 4, r. 67; Jervis's Rules, 60, note (*q*).

" by reason of such certificate or order, or by the choice of the " plaintiff or otherwise, and judgment shall be afterwards signed " thereon, such judgment shall be entered of record as of the " day of the return of such writ, unless the Court shall other- " wise direct." The 4th section authorizes the Court to grant a new writ of inquiry. The 6th section suspends the taxation of costs between the last day of August and 21st October in every year.

The enactments in 3 & 4 W. 4, c. 42, as to writs of inquiry *of truth of breaches*, and *assessment of damages*, to be executed before the sheriff.

Before the 3 & 4 W. 4, c. 42, sect. 16, when a judgment on demurrer or by default had been obtained on a bond, and it became necessary to suggest breaches, the truth of the same and the consequent damages must have been tried and assessed by a jury *before one of the judges;* but that they deemed it unnecessary, the 3 & 4 W. 4, c. 42, sect. 16, after reciting that, " And " it would lessen the expense of trials and prevent delay, if such " writs of inquiry as hereinafter mentioned were executed, and " such issues as hereinafter mentioned were tried *before the* " *sheriff of the county* where the venue is laid," therefore enacts, " That all writs issued under and by virtue of the statute 8 & " 9 W. 3, c. 11, sect. 8, shall, unless the Court where such ac- " tion is pending, or a judge of one of the said superior Courts, " shall otherwise order, direct the *sheriff of the county* where " the action shall be brought, to summon a jury to appear " *before such sheriff,* instead of the justices or justice of assize " or nisi prius of that county, to inquire of the truth of the " breaches suggested, and assess the damages that the plaintiff " shall have sustained thereby; and shall command *the said* " *sheriff to make a return thereof* to the Court from whence " the same shall issue, at a day certain in term time or in vaca- " tion, in such writ to be mentioned; and such proceedings " shall be had after the return of such writ as are in the said " statute in that behalf mentioned, in like manner as if such " writ had been executed before a justice of assize or nisi " prius."

Sect. 17 directs certain *issues* also to be tried before the sheriff, as will hereafter be noticed.

Upon the return of a writ of inquiry or a trial of issues, judgment to be signed, unless, &c.

Sect. 18 enacts, " That *at the return of any such writ of in-* " *quiry,* or writ for the trial of such issue or issues as aforesaid, " costs shall be taxed, judgment signed, and *execution issued* " *forthwith, unless the sheriff* or his deputy, before whom such " writ of inquiry may be executed, or such sheriff, deputy, or " judge before whom such trial shall be had, *shall certify under* " *his hand upon such writ* that judgment ought not to be " signed until the defendant shall have had an opportunity to

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"apply to the Court for a new inquiry or trial, or a judge of "any of the said Courts shall think fit to order that judgment "or execution shall be stayed till a day to be named in such "order, and the verdict of such jury, on the trial of such issue "or issues, shall be as valid and of the like force as a verdict of "a jury at nisi prius; and the sheriff or his deputy or judge, "presiding at the trial of such issue or issues, shall have the "like powers with respect to amendment on such trial as are "hereinafter given to judges at nisi prius."

Sheriff as to such issues to have the like powers as judges at nisi prius.

Sect. 19 provides, "That the provisions contained in the statute 1 W. 4, c. 7, sect. 1, (*f*) shall, so far as the same are applicable thereto, be extended and applied to judgments and "executions upon such writs of inquiry and writs for the trial "of issues in like manner as if the same were expressly re-"enacted herein."

Provisions of 1 W. 4, c. 7, to extend to such writs of inquiry and issues.

And sect. 20 enacts, "That the sheriff of each county in "England and Wales shall severally name a sufficient deputy, "who shall be resident or have an office within one mile from "the Inner Temple Hall, for the receipt of writs, granting "warrants therein, making returns thereto, and accepting of "all rules and orders to be made on or touching the execution "of any process or writ to be directed to such sheriff."

Sheriffs to name deputies to be resident in London.

We will now notice the other recent rules, enactments, and decisions relating to judgments by default.

Rules of Hil. Term, 2 W. 4, relative to judgment by default.

The Reg. Gen. Hil. Term, 2 W. 4, contains several rules relating to judgments by defaults, &c. Reg. Gen. 66, orders that "judgment for want of a plea after demand may in all "cases be signed *at the opening of the office in the afternoon* "*of the day after* that on which the demand was made, but "not before." This rule assimilates the practice of King's Bench and Exchequer to that in Common Pleas, for before this rule, in King's Bench the plaintiff had always to wait *twenty-four hours* after his demand of plea, exclusive of Sunday, which gave rise to much discussion and uncertainty respecting the time of demand, and when the twenty-four hours expired, but now in all the Courts, even if the demand of plea were not until just before nine o'clock in the evening, the plaintiff may sign judgment in the afternoon of the next day, unless in the interim the defendant has pleaded. (*g*)

How soon may be signed.

Reg. 67 orders that, "after the return of a writ of inquiry, "judgment may be signed at the expiration of four days from

(*f*) *Ante*, 674.
(*g*) See the previous practice, Tidd, 9th. ed. 477; Jervis's Rules, 59, n. (*p*).

"such return, and after a verdict or nonsuit on the day after "the appearance day of the return of the distringas or habeas "corpora, without any rule for judgment;"(h) which rule assimilates the practice of K. B. to the previous practice in C. P. and Exchequer. Before this order (67) it was necessary in K. B. to give a rule before final judgment on the inquisition could be signed; but in C. P. and Exchequer, though the plaintiff was required to wait the four days, yet no rule was necessary. (h)

Reg. 101 orders that "there shall be no rule for the sheriff "to return a *good jury* upon a writ of *inquiry*, but an *order* "shall be made by a judge upon *summons* for that purpose." Before this order, in C. P. a special rule was necessary, though absolute in the first instance; and in K. B. the application for a good jury upon an inquiry was a common motion, drawn up on counsel's signature.(i) It will be observed that both those proceedings were attended with expense, without the opponent having an opportunity of resisting the application, or the Court or a judge exercising any judgment in allowing the application; but now the rule requires the actual decision of a judge at chambers, if the summons be opposed.

Reg. 105 orders that "after judgment by default, the entry "of any subsequent continuances shall not be required." This last rule assimilates the practice of K. B. to the former practice in C. P. (k) But still if it should be necessary to state any fact that has recently occurred, as a death, or change of attorney, pending the suit, the facts may be stated as having occurred at the proper date, by adopting the language of former entries of an imparlance or continuance, according to the state of the cause, and as suggested in a subsequent page. (l)

The practical proceedings on signing judgment by default, &c.

When the plaintiff is entitled to sign judgment by default, and the defendant's appearance has previously been entered, the plaintiff's attorney makes what is termed an *Incipitur* of the declaration on paper, and an Incipitur on the roll, and these are to be taken to the clerk of the judgments (or in C. P. to the prothonotary,) who will sign the interlocutory judgment, and as evidence of that official act, will sign the judgment, and *mark the judgment paper;* so that the Court itself does not pronounce any interlocutory judgment, and the same is signed as a matter of right, though by an officer regularly authorized for the purpose.

(h) See previous practice, Tidd, 9th ed. 581, 903; Jervis's Rules, 60, n. (q).

(i) See former practice, Tidd, 485, 486, 576, 787; Jervis's Rules, 70, n. (y).

(k) Tidd, 569, 678; and see Jervis's Rules, 71, n. (c).

(l) See form suggested, *post*, 701, note (z), and see Index of this volume, tit. Suggestion.

CHAP. XIX. VI. JUDGMENT BY DEFAULT.

Issuing writ of inquiry.

The judgment having been thus signed, the plaintiff's attorney next *issues* the *writ of inquiry* when necessary, as is usual in actions of assumpsit, (except on bills, notes or checks, or other cases referred to the Master to compute, presently stated,) covenant and actions for *torts*, as case, trover, or trespass, and in actions of debt on bond, conditioned for the performance of any other acts than a single payment of money. The writ of inquiry is usually engrossed on parchment, and is sealed at the proper office, upon which the small fee of 7*d*. is paid. In C. P. it is to be signed by the prothonotary, but in K. B. this is not necessary. It may we have seen be made returnable on a day certain in vacation. It is usual to indorse on the writ the day it is to be executed, being some day before the return day, and there is an express rule that the writ, when to be executed in London or Middlesex, shall be left at the sheriff's office the day before it is to be executed at the latest; (*k*) and indeed, as well in cases where under the new rule a good jury has been applied for, (*l*) as in all other cases, even more time should be afforded to the under-sheriff. The plaintiff's attorney is to pay to the under-sheriff, with the writ of inquiry, to be executed in London, 1*l*. 9*s*. 4*d*., and if in Middlesex, 1*l*. 10*s*. 4*d*. and if in any other county, 1*l*. 11*s*. 6*d*., and in each case 4*d*. additional for each witness. The under-sheriff thereupon summons the jury who are to execute the inquisition.

Of a good jury.

If the judge has upon application under Reg. Gen. Hil. Term, 2 W. 4, reg. 101, made his order for an inquisition before a *good jury*, the under-sheriff is to summon a *better sort* of common jury, and the costs of such good jury are usually allowed to the plaintiff. (*m*)

Of *notice of* inquiry, *continuance* thereof, and *countermand*.

From the books on Practice it will be obvious that the sufficiency of the *notice of inquiry*, and the *continuance* and *countermand* thereof, are frequent subjects of litigation, (*n*) and to those works we must here refer. The general rule in all the Courts is, that if the venue be laid in London or Middlesex, and the defendant live within forty *computed* miles from London, it suffices to give *eight days'* notice to the defendant of executing the writ of inquiry, *exclusive* of the day of giving the notice, and *inclusive* of the day on which the inquiry is to be executed; and the same eight days' notice is sufficient when the venue is laid in any *other county*. But when the

(*k*) Reg. Hil. Term, 23 Geo. 3, K. B. and C. P.

(*l*) As *ante*, 677, Reg. Gen. Hil. Term, 2 W. 4, reg. 101.

(*m*) *Wilkinson* v. *Malin*, 1 Crom. & Mees. 238; 3 Tyrw. 255; 1 Dowl. 630, S. C. See previous practice, *Calvert* v. *Gordon*, 2 M. & R. 124, 128.

(*n*) Tidd, 9th ed. 576 to 578; 2 Arch. K. B. 4th ed. 595; Chitty, Summary Prac. 125 to 127, fully as to *Time*.

venue is laid in London or Middlesex *and* the defendant lives above forty computed miles from London, then there must be *fourteen days'* notice of inquiry, although *ten days'* notice of trial of *an issue* joined would in such case suffice.(*o*)

The execution of the writ of inquiry and attendance of counsel.

As since the 1 W. 4, c. 7, s. 1, and the 3 & 4 W. 4, c. 42, writs of inquiry may in all cases not only be executed before a sheriff in the vacation, *but the judgment and execution thereon will, as of course, be immediate, unless the sheriff* can be induced *to certify* that the defendant ought to have time till the next term, either to move in arrest of judgment, or for a new trial, or unless a single judge can, on application, be induced so to certify,(*p*) it will frequently be advisable, in cases of the least difficulty or doubt on any point of law, to have the assistance of *counsel* on behalf of a defendant, first giving early notice of the intention to retain such counsel, to the plaintiff's attorney. It will also be advisable to be prepared with an *affidavit of facts,* sufficient to induce the sheriff or a judge to interfere to suspend immediate execution. The practice on that occasion will be nearly similar to that to be observed in order to induce a learned judge not to authorize immediate execution after the *trial of an issue,* and will therefore be considered in that part of the work.

Recent decisions.

It will here be proper to notice a few recent decisions relative to judgments by default and notices of inquiry; and first it seems that there is a file on which the inquisition and subsequent proceedings thereon are filed, and a fee for so filing them is charged and allowed to a plaintiff's attorney. It has been decided that a writ of inquiry having been executed, and a defendant taken in execution in vacation, under the 1 W. 4, c. 7, s. 1, the plaintiff's attorney should file the *inquisition and subsequent proceedings,* or suffer them to be copied, in order to give the defendant an opportunity of inspecting them, so as to ascertain whether there be any ground for arresting the judgment under sect. 4; and where the plaintiff's attorney refused to file such inquisition and proceeding, he was, on a rule nisi, compelled to do so with costs.(*q*)

It has also been decided that where a defendant is under terms of taking *short notice of trial,* he is not thereby bound to take short notice of inquiry,(*r*) and therefore where a defendant prays an extension of his time of pleading, or other favour, the plaintiff's attorney will do well to pray that he may also be

(*o*) See Chitty's Summary of Practice, 123, fully as to the *time.*
(*p*) *Ante,* vol. iii. 93, 94.
(*q*) *Townsend* v. *Burns,* 3 Tyrw. 104.
(*r*) *Stevens* v. *Pell,* 2 Crom. & M. 421; 4 Tyrw. 267; 2 Dowl. 355, S. C.

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required to take short notice of inquiry. (*r*) But where eight days' notice of executing a writ of inquiry were given, instead of fourteen, it was held that the defendant ought immediately to return the same to the plaintiff's attorney, with notice of the irregularity in his proceeding, (*r*) and he having neglected to give any explicit notice, was refused costs, though the inquisition was set aside. (*r*) Where neither the process nor the declaration had been personally served on the defendant, and the defendant had not appeared to the writ of summons, but a distringas had been obtained, and a judge's order for entering an appearance for the defendant sec. stat., and on application at the defendant's residence, the people there refused to state where he was gone, and thereupon the Court had given leave to stick up notice of the declaration in the office, and leave a copy at such house afterwards; the Court, on application for leave to serve a *notice of inquiry*, by sticking it up in the office, and leaving a copy at such the defendant's last residence, granted a rule that *sticking up the notice of inquiry in the office* and leaving a copy at the defendant's last place of residence should be good service, unless cause was shown within a week. (*s*)

Of *setting aside* a judgment by default, when irregular or regular.

In general if a defendant do not plead *in due time*, the plaintiff's attorney, at the opening of the office in the subsequent afternoon, may sign judgment as for want of a plea, unless a *plea in bar* has in the meantime been pleaded, and which the plaintiff in that case is bound to accept, though delivered after the time for pleading has expired. (*t*) But if the defendant's attorney deliver a plea *in abatement* after the expiration of the four days within which it must be regularly pleaded, or omit to make the requisite affidavit, it may be treated as a nullity, and it will be advisable to return it. (*u*) So if the defendant be under terms of *pleading issuably*, and demur specially merely in respect of a technical objection, or deliver any other plea not issuable within the terms of the order, the defendant may sign judgment; though we have before seen that the safer course is to apply for leave to do so. So if a special plea requiring counsel's signature be delivered unsigned, it may be treated as a nullity, and judgment signed.

(*r*) *Stevens* v. *Pell*, 2 Crom. & M. 421; 4 Tyr. 267; 2 Dowl. 355, S. C.

(*s*) *Watson* v. *Delcroix*, 2 Crom. & M. 425; 2 Dowl. 396; 4 Tyrw. 266, S. C.; *ante*, vol. iii. 296; *post*, 705, (*a*).

(*t*) *Amphlit* v. *Temple*, 2 Tyr. 312; 2 Cromp. & J. 358, S. C.

(*u*) *Nolleken* v. *Severn*, 2 Cromp. & J. 333; 1 Dowl. 320.

CHAP. XIX. VI. JUDGMENT BY DEFAULT.

In all these cases, however, of *regular judgments by default*, if a defendant apply *promptly* upon a sufficient *affidavit of merits*(x) to set aside the judgment, whether interlocutory in *assumpsit* or final in *debt*, the Court or a judge will almost as of course set aside such judgment on payment of costs and pleading an issuable plea, and agreeing to take short notice of trial, (and to which the plaintiff's attorney should take care to have added short notice of *inquiry*,) and any other reasonable terms the Court or judge may in each case think fit to impose, as admitting handwriting, &c. and sometimes giving judgment of the term. Most of these points will be considered when we speak of the practice relating to a *defendant's pleading*.

If the judgment has been *irregularly* signed, then of course the Court will, on a prompt application, set it aside; and if the irregularity and the practice upon the point be clear, the Courts will make the *plaintiff pay costs* almost of right, or rather of course. (y) It is in general advisable, however irregular the judgment may have been, to swear to a good defence on the merits, whenever the facts will justify the so swearing, as naturally more strongly inclining the Court in favour of the application.

VII. Of *References to the Master or Prothonotary, to compute, &c.* (z)

When a defendant has suffered judgment by default to a declaration containing a count upon a Bill of Exchange, Promissory Note, Check on a Banker, Mortgage Deed, Lease, or contract for Rent, or payment of an Annuity, or in an action on an Award merely for the payment of money, although the plaintiff may still execute a writ of inquiry, (a) yet it has long been the practice to adopt the less expensive and more expeditious course of referring such claim to the master or prothonotary of the Court, to ascertain and fix by his allocatur the amount of the principal money and interest that may be payable, and to tax the plaintiff's costs; but in these cases, if the declaration contain any count or breach upon any other description of claim, there must, before final judgment, be an entry of nolle prosequi relating to the same. In these cases, after interlocu-

(x) See requisites, *ante*, 543, 544.

(y) Per Dampier, J. 1 Chitty's R. 398, 399, in notes; and *ante*, 597 to 601.

(z) See the practice in these cases, Tidd, 9th ed. 570 to 573; 2 Arch. K. B. 4th ed. 590, 602, 603; T. Chitty's Forms, 2d ed. 405 to 407; Chitty on Bills, 8th ed. 600 to 604.

(a) Where it appears doubtful how much remains due, the Court will still direct a Court of inquiry, *Jardine* v. *Williams*, 7 Law Journal, page 31, Mich. T. 1828, K. B.; Chitty on Bills, 8th ed. 802, *addenda*.

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tory judgment by default for want of a plea, or for not producing the record (where a plea of judgment recovered has been pleaded,) has been signed, or demurrer in favour of the plaintiff given, the course is to make a concise affidavit of the nature of the claim declared on, so as to show that the case is fit to be referred to the master or prothonotary, and stating what judgment has been signed, and thereupon *in term time* counsel is instructed to move for a *rule nisi* that the claim and costs be so referred to such officer, which having been obtained as of course, and drawn up and duly served, then upon producing a sufficient affidavit of the service of the rule nisi, the Court will make the same *absolute*, unless sufficient cause be shown in due time. *In vacation* a *judge* on summons, and the signature of counsel, grants his fiat for drawing up the rule. (*b*) The practice has already been sufficiently stated; (*b*) and to avoid repetition we shall only notice points and recent decisions not before stated.

If in an action against three defendants on a note, they all suffer judgment by default, service of the rule nisi to compute on one of them suffices, because by such judgment they admit they were partners quoad that transaction, and notice to one therefore legally operates as notice to all. (*c*) The circumstance of a bill or note having been *lost*, constitute no answer to a rule nisi of this nature, although the defendant may still at law be in jeopardy. (*d*) But if the Court be satisfied on the behalf of a defendant, that there is a fair question for a jury as to the amount really due on the bill, they will leave the plaintiff to his writ of inquiry, and will not make absolute a rule for referring to the Master or Prothonotary by the usual rule to compute. (*e*)

Of showing cause against the rule nisi to compute.

No irregularity previous to or in signing the interlocutory judgment can be shown as cause against a rule nisi to compute, but should be made the subject of a cross motion to set aside such judgment for irregularity, and in the mean time to stay proceedings on such judgment, and in that case the Court will usually direct that both the rules shall be brought on together. (*f*) But the defendant may show as cause upon affidavit any fact which establishes either that according to the

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(*b*) *Id. ibid.*

(*c*) *Figgins* v. *Ward*, 4 Tyr. 282; 2 Dowl. 364; 2 Crom. & M. 424, S. C.

(*d*) *Clarke* v. *Quince*, 3 Dowl. 26; *Brown* v. *Messder*, 3 M. & Sel. 281; *Allen* v. *Miller*, 1 Dowl. 420.

(*e*) *Jardine* v. *Williams*, K. B. Mich. T. A. D. 1828; 7 Law Journal, 31; Chit. on Bills, 8th ed. 802, *addenda*.

(*f*) 1 Bos. & Pul. 360; *Marryatt* v. *Winkfield*, 1 Chitty's R. 119.

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existing practice the instrument is not such a claim as can be referred to the master, or that under the particular circumstances an inquiry before the sheriff, attended by witnesses, will be more just, as in the case before mentioned, where the defendant insisted he had made payments on account, and where the defendant's witnesses cannot be compelled to attend before the master, nor can he receive parol evidence without express authority. (g)

(g) *Jardine* v. *Williams*, *supra*, 682 (e); *Noy* v. *Reynolds*, 1 Harr. & Wol. 14.

CHAPTER XX.

PROCEEDINGS BETWEEN DECLARATION AND PLEA, WHERE THE DEFENDANT ADMITS THE ACTION TO BE IN PART SUSTAINABLE.

CHAP. XX.

I. OF PAYMENT OF MONEY OR DAMAGES INTO COURT, either as of course at common law, or by leave under 3 & 4 W. 4, c. 42, sect. 21. (a)

WE are next to consider the practice in cases where the defendant admits that he has only a partial defence, but the plaintiff and defendant not agreeing upon the amount of the claim, the former *will not consent* to the common summons or rule for staying proceedings on payment of a named sum in full for the debt and costs; and thereupon it becomes advisable for the defendant, (unless it be *certain* that before the commencement of the action he made a *legal tender* that can be *safely pleaded* in bar,) (*b*) to pay money into *Court*, i.e. the amount of the sum which he is assured will cover the utmost claim, leaving the plaintiff at liberty to proceed for any further claim at his peril. At *common law*, and before the recent act 3 & 4 W. 4, c. 42, s. 21, the practice of a defendant's paying money into Court was confined to actions upon *contracts* for the recovery of *a debt* which was either certain in amount, or capable of being ascertained by ordinary computation, and without the exercise of any discretion or judgment by a jury. (*c*) And in a penal action, at the suit of a common informer, where the declaration contains several counts for different penalties, the defendant may as of right pay one or several penalties into Court, and leave the plaintiff to proceed at his peril for the residue. (*d*) But in an action for what was termed *general* or *uncertain damages*, whether claimed for the breach of a contract, (*e*) or for a breach

(*a*) See in general Tidd, 9th ed. 619 to 629; 2 Arch. K. B. 4th ed. 833 to 842.

(*b*) As to what is or not a legal tender, see *ante*, vol. i. 505 to 508. It is always *safer* to pay money into Court than to plead a tender, per Lord Tenterden, C. J. in *Leatherdale* v. *Sweepstone*, 3 Car. & P. 342.

(*c*) Tidd, 9th ed. 619; *Hallett* v. *E. I. Company*, 2 Burr. 1120.

(*d*) *Webb* v. *Punter*, 2 Stra. 1217; 2 Kenyon, 292; *Stack* v. *Eagle*, 2 Bla. 1052; Tidd, 541.

(*e*) *Hodges* v. *Lord Litchfield*, 3 M. & Scott, 201; 2 Dowl. 741, S. C.; but see *Smith* v. *King*, 3 M. & Scott, 799; 2 Dowl. 750, that, if the particulars state a *particular sum* as the extent of the *damages*, the full amount as stated may be paid into Court.

of duty by a sheriff under an execution,(*f*) or for a tort or in trover or trespass, (*g*) money was not allowed to be brought into Court; and one reason assigned was, that it would be hard in an action for an injury, thus uncertain in its consequences as to the amount of damages, to place the plaintiff in a situation of risk by his proceeding to trial in expectation of being able to prove facts sufficient to induce a jury to give in damages more than the sum paid into Court. So that, supposing the defendant were ever so well disposed in an action for the breach of a promise, as in an action against a tenant for bad husbandry, *to prevent further expenses by paying a sum even twice exceeding the real damages*, yet he could not do so, but must have incurred the expense of a trial or an inquiry; and the law still continues the same as to the excepted injuries to the *absolute* or *relative* rights of *persons*, subject nevertheless to this exception, viz. that if the plaintiff has delivered particulars of his demand, as in an action for dilapidations, limiting his claim to £50 or other fixed sum, then the Court has permitted that named sum to be paid into Court, leaving the plaintiff to proceed for further damages at his peril; (*h*) and there is another common law exception, viz. that in an action of ejectment for the forfeiture of a lease alleged to have been incurred by three breaches of covenant, viz. one non-payment of rent, and the others for assigning without license and neglecting to repair, the defendant may pay the rent into Court. (*i*) So in an action on a replevin bond against the sureties, the Court will stay the proceedings on their paying into Court the value of the goods distrained and double costs, and the costs of the application, or if that value exceed the amount of the rent due, then they will be relieved on payment of the rent and such costs. (*k*)

The recent alteration and improvement enacted by 3 & 4 W. 4, c. 42, sect. 21, enabling a defendant, by leave of Court or judge to pay money into Court in *most* personal actions. (*l*)

Perhaps one of the most valuable of the recent improvements in the law is, that introduced by the statute alluded to, which has very *greatly extended the power of paying money into Court*, provided in each particular case the leave of the Court or a judge be first obtained. This act, the 3 & 4 W. 4, c. 42,

(*f*) *Woodgate* v. *Baldock*, 2 Dowl. 256; *Groombridge* v. *Fletcher*, *id.* 353.

(*g*) *Gibson* v. *Humphrey*, 2 Dowl. 68.

(*h*) *Smith* v. *King*, 3 M. & Scott, 799; 2 Dowl. 750.

(*i*) *Doe* dem. *Stanley* v. *Towgood*, 2 Dowl. 404.

(*k*) *Hunt* v. *Round*, 2 Dowl. 558.

(*l*) See valuable observations on this act, and common law report, on which it was founded, in Bosanquet's Rules, 41, note 38. The prior common carriers' act, 11 Geo. 4, and 1 W. 4, c. 68, sect. 10, gave the defendant the power of paying money into Court, in an action for the loss of or injury to any goods delivered to be carried, *as of course*, and without leave of the Court or a judge.

CHAP. XX.
I. PAYMENTS INTO COURT.

Enactment in 3 & 4 W. 4, c. 42, s. 21, defendant to be allowed to pay money into Court even in certain actions *for torts* by judge's order.

sect. 21, enacts, "That it shall be lawful for the defendant, "*in all personal actions*, (except actions for *assault and battery, false imprisonment, libel, slander, malicious arrest or* "*prosecution, criminal conversation, or debauching of the* "*plaintiff's daughter or servant*,) by *leave* of any of the said "superior Courts where such action is pending, or a judge of "any of the said superior Courts, *to pay into Court a sum of* "*money by way of compensation or amends*, in such manner "and under *such regulations as to the payment of costs and the* "*form of pleading*, as the said judges, or such eight or more of "them as aforesaid, shall by any rules or orders by them to be "from time to time made, order and direct."

Salutary effect of this enactment.

This excellent enactment enables a defendant, in every personal action excepting those above enumerated, upon discovering that he has not a sufficient defence to the whole or a part of the claim, though for unascertained damages, by leave of a judge, to pay a sum into Court sufficient to cover the utmost damages, it is supposed the plaintiff might recover, and afterwards, if the plaintiff should proceed to trial upon the question of the sufficiency of the sum paid, he will do so at his peril as to the costs subsequent to the payment into Court. It is perhaps to be regretted that there are any exceptions, for if there were not, then many a trifling but expensive action for an assault or slander might be stayed by a defendant paying *5l.* or other small sum into Court, rather than incur the trouble and expense of defending the action to trial. In all actions to which this statute extends, it will remove the difficulties that occurred in staying proceedings in actions for unliquidated damages, where the defendant admits that he has incurred liability, as by a seizure or temporary detention of property, which he is ready to give up, in which cases sometimes (though not always so,) a judge would stay the proceedings *on restoring* the property and paying costs. (*m*) Since the above statute a defendant, notwithstanding the pendency of the action, may return the deeds or goods, or offer to do so, and then obtain the leave of a judge to pay into Court and plead the payment of a sum sufficient to cover the utmost sum that a jury would afterwards give for the injury to the property and temporary detention, and the costs, after which the plaintiff would proceed at his peril.

(*m*) See cases, Tidd, 9th ed. 544, 545, 619 to 629; *Phillips v. Hayward*, 1 Harr. & Wol. 108; 3 Dowl. 362, S. C.; *Gibson v. Humphrey*, 2 Dowl. 68. See the next section as to staying proceedings on restoring *deeds* or *goods*.

The recent general rules relating to payment of money into Court.

Before this enactment, and consequently before the rules thereon were promulgated, the Reg. Gen. of Hil. Term, 2 W. 4, reg. 55, ordered, that "In all cases in which money may be "paid into Court, leave to pay it may be obtained by a *side* "*bar rule*," which assimilated the practice in that respect in all the Courts. (*n*)

Reg. Gen. Hil. Term, 2 W. 4, reg. 56, ordered that, "On "payment of money into Court, the defendant *shall undertake* "*by the rule to pay the costs*, and in case of non-payment, to "suffer the plaintiff either to move for an attachment, on a "proper demand and service of the rule, or to sign final judg- "ment for nominal damages." Which regulation also assimilated the practice in all the Courts, and enables a plaintiff, at his option, to proceed by attachment for non-payment of the costs, or to sign judgment for nominal damages, as 1*s*., and thereupon tax and issue execution for the costs. (*o*) It was recently held, that where the defendant had paid 1*l*. 3*s*. 7*d*. into Court, and such undertaking had been omitted in the rule, the plaintiff had not, on that account, a right to put the defendant to the expense of proceeding to trial, especially as the defendant had offered to abide the decision of the Court upon the disputed question, whether the plaintiff was entitled to any costs. (*p*) But all discussion on this point is at rest, because Reg. Gen. Hil. Term, 4 W. 4, reg. 19, as to paying money into Court, and pleading the same, and stated in the next page, seems virtually to have annulled the above rule.

The Reg. 104 ordered, that "Where money is paid into "Court in several actions which *are consolidated*, and the "plaintiff without taxing costs proceeds to trial in one and "fails, he shall be entitled to costs in the others up to the time "of paying money into Court."

The Reg. Gen. Hil. Term, 4 W. 4, relative to payments of money into Court.

Reg. 17. The payment of money into Court *in all cases* is to be *pleaded specially* in the form prescribed. (*q*)

Next in order of time was the above act, 3 & 4 W. 4, c. 42, sect. 21, and afterwards were promulgated the general rules thereon as follows, viz. Reg. Gen. Hil. Term 4 W. 4, r. 17, ordered, "That when money is paid into Court such payment "*shall be pleaded in all cases*, and as near as may be in the "following form, mutatis mutandis.

(*n*) See Tidd, 622; Jervis's Rules, 56, note (*e*).

(*o*) Jervis's Rules, 56, 57, note (*f*); Tidd, 626, 627. In 2 Arch. K. B. 4th ed. 837, note (*a*), it is suggested that this rule is virtually superseded by that of Hil. Term, 4 W. 4 reg. 19.

(*p*) *Jones* v. *Owen*, 2 Crom. & Jerv. 476.

(*q*) See observations on this rule and form of plea, Bosanquet's Rules, 41, 42, note 38 to 40; *id.* Precedents 97, 107, 122; and see forms of plea and replication, *Clark* v. *Nicholson*, 6 Car. & P. 712; 1 Gale, 21; 3 Dowl. 454, S. C. And see bad forms, *Sharman* v. *Stevenson*, 1 Gale, 74; 3 Dowl. 709; *Coates* v. *Stevenson*, 1 Gale, 75.

CHAP. XX.
I. PAYMENTS INTO COURT.

Prescribed plea of payment into Court.

"C. D. } The —— day of ——
" ats. } The defendant by —— his attorney [*or* ' in per-
" A. B. } son, &c.'] says that the plaintiff ought not further
" to maintain his action, because the defendant now brings
" into Court the sum of £——, ready to be paid to the plain-
" tiff; and the defendant further says that the plaintiff has
" not sustained damages, [*or in actions of debt* ' that he is
" not indebted to the plaintiff'] to a greater amount than the
" said sum, &c. in respect of the cause of action in the declara-
" tion mentioned, and this he is ready to verify; wherefore he
" prays judgment if the plaintiff ought *further to maintain his*
" *action.*"

Reg. 18. No rule or order to pay money into Court to be necessary except in cases under 3 & 4 W. 4, c. 42, s. 21.

Reg. 18 orders that "No rule or judge's order to pay money "into Court shall be necessary *except* under the 3 & 4 W. 4, "c. 42, s. 21; but the money shall be paid to the proper officer "of each Court, who shall give *a receipt for the amount* in the "margin of the plea, *and the said sum* shall be paid out to "the plaintiff on demand."

Reg. 19. *Prescribed replication* to plea of payment of money into Court.

Reg. 19 orders that "The plaintiff, after the delivery of *a* "*plea of payment of money into Court,* shall be at liberty *to* "*reply* to the same *by accepting* the sum so paid into Court in "full satisfaction and discharge of the cause of action in "respect of which it has been paid in; and he shall be at "liberty in that case to tax his costs of suit, and in case of "nonpayment thereof within forty-eight hours, to sign judg-"ment for his costs of suit so taxed; or *the plaintiff may reply* "' *that he has sustained damages* [*or that the defendant is* "*indebted to him, as the case may be,*] *to a greater amount than* "*the said sum;*' and in the event of *an issue thereon* being "found for the defendant, the defendant shall be entitled to "judgment and his costs of suit."

Decisions on form and requisites of *plea* of payment into Court.

Although we have seen that the Reg. Gen. Hil. T. 4 W. 4, r. 17, prescribes the forms of plea and replication, yet difficulties have arisen in framing the former: (*r*) thus, where in indebitatus assumpsit for money had and received, and on an account stated, the defendant, as it was considered, incorrectly pleaded first, as to 25*l.* parcel of the monies mentioned in the declaration payment of 25*l.* and concluded with a verification; and then as to the residue of the monies mentioned in the declaration pleaded non-assumpsit, concluding to the country, and the Court on demurrer held the plea insufficient, as not pleaded according to the rule; (*s*) and the plea of payment into Court should be

(*r*) See the cases, *ante,* 687, note (*q*).

(*s*) *Ante,* 687, 688; *Sharman* v. *Stevenson,* 1 Gale, 74; 3 Dowl. 709, S.C.; and *Coates* v. *Stevens,* 1 Gale, 75; 3 Dowl. 784, S.C.; see form of plea, *supra,* 688.

pleaded *last and as to the residue;* and the plea or pleas denying the other parts of the claim should be pleaded first. (*t*) The payment into Court *must be pleaded,* or otherwise the defendant will not be entitled to costs, although he has paid more than sufficient. (*u*)

Consequences of paying money into Court.

Before the late act, 3 & 4 W. 4. c. 42, sect. 21, the paying money into Court was considered an admission of the cause of action as laid, and in an action against several of a *joint liability,* and therefore, where in *indebitatus assumpsit* against several, on an alleged joint contract, if money be paid into Court generally the defendants are estopped from proving that some of them were not parties to the contract, even beyond the amount of the sum paid into Court. (*v*)

If in an action for damages, as by a landlord against his tenant for the breach of an agreement for good husbandry, money has, by leave of the Court or a judge, been paid into Court, under the above statute and rules, the defendant cannot afterwards obtain leave to apply the sum as paid in under a plea *of tender,* for the statute does not alter the law in other respects so as to enable a defendant to plead a *tender,* excepting in actions for *money* demands. (*x*)

Where the plaintiff originally indorsed a larger claim on the writ than he could sustain, and afterwards the defendant paid into Court a less sum, being the real debt, and the plaintiff took it out, the Court will order that the plaintiff shall be allowed only the costs of his writ and no subsequent costs, the defendant having originally offered to pay the real debt and costs of writ; but the defendant should be prompt in his application. (*y*)

Where a defendant has been arrested for more than is due, there is an objection in that case to the payment of money into Court, viz. that if the plaintiff take that money out of Court, and forbear to proceed further, the case is not within the words of the 43 G. 3, c. 46, sect. 3, and consequently the defendant cannot apply for costs in respect of such arrest. (*z*)

Time of payment into Court and practical proceedings.

The application to pay money into Court, when of course and independent of 3 & 4 W. 4, c. 42, sect. 2, should regularly

(*t*) *Sharman* v. *Stevenson*, 3 Dowl. 709; 1 Gale, 74, and *Coates* v. *Stevens*, 1 Gale, 75, S. P.; 3 Dowl. 784, S. C.

(*u*) *Adlard* v. *Booth*, 1 Bing. N. C. 693.

(*v*) *Ravenscroft* v. *Wise and others*, 2 Dowl. 676; 1 Crom. M. & Ros. 203, S.C.

(*x*) *Barrett* v. *Deale*, 9 Legal Observer, 108.

(*y*) *Hale* v. *Baker*, 2 Dowl. 125; *Elliston* v. *Robinson*, 2 Crom. & M. 343; 2 Dowl. 241, S.C. and *ante*, vol. iii. p. 281, note (*n*) and (*m*); and see other cases, Tidd, 9th ed. 622, 623, and 2 Arch. K.B. 4th ed. 838 to 840.

(*z*) *Rowe* v. *Rhodes*, 4 Tyrw. 219; 2 Dowl. 384, S. C.

CHAP. XX. I. PAYMENTS INTO COURT.

be made *before plea;* but it is frequently made, and in many cases expressly authorized, as in actions against a justice of peace, *after* plea, on obtaining a judge's order for that purpose; and the Courts have given a defendant leave to withdraw the general issue in order to bring money into Court and replead it on payment of costs, and this even after the granting a new trial. (*a*) So if enough has not been paid in the first instance, by leave a further sum may be paid. (*b*) The money may be, and frequently is, paid in specially on a particular count, so as to enable the defendant to recover the costs of defence as to the other counts, if abandoned or nor proved by the plaintiff. (*c*)

When the money is to be paid into Court as *of course,* the plea of payment is to be first prepared, and a copy made; and we have seen that Reg. Gen. Hil. T. 4 W. 4, r. 18, directs that no rule or judge's order shall be necessary; (*d*) but the money shall be paid to the proper officer of each Court, who is to give a receipt for the money in the margin of the copy of the plea to be delivered to the plaintiff's attorney in due time, and to whom the money is to be paid on demand.

In cases where under the 3 & 4 W. 4, c. 42, sect. 21, the claim being unliquidated, actual leave of the Court or a judge is necessary, it may be advisable to make an *affidavit* of the facts and to apply to a judge by *summons* to be served as in ordinary occasions; and at the time of hearing, such affidavits and the *declaration* should be produced and the object of the application concisely stated. If the judge make an order it must be forthwith drawn up and a copy served on the plaintiff's attorney; the proper plea of payment, with other pleas when necessary, must then be prepared and signed by counsel, and taken with the money and rule or order permitting the payment into Court to the proper officer, (or in K. B. to the bankers of that Court, in Fleet Street,) and who will give the proper receipt for the money, and all these documents are then to be taken to the proper officer, who will write a receipt on the margin of the plea as before, and then the plea is to be delivered to the plaintiff's attorney. (*e*) One great utility in these alterations in the practice is, that the defendant need not now in any case as heretofore produce on the trial

(*a*) Tidd, 621, 622.
(*b*) 2 Arch. K.B. 4 ed. 836.
(*c*) *Early* v. *Bowman*, 1 Bar. & Adol. 889; *Churchill* v. *Day*, 3 Mann. & Ry. 71.
(*d*) *Ante*, 688.
(*e*) As to the subsequent proceedings, see 2 Arch. K. B. 4 ed. 837.

the rule for paying the money into Court; for the replication must now admit such payment, and usually merely puts in issue whether or not he has sustained greater damages than the sum so paid.

II. OF RESTORING DEEDS, GOODS, &c. WITH COSTS.

We have seen that the Courts in general, before the 3 & 4 W. 4, c. 42, s. 21, refused to permit money to be paid into Court in actions for unliquidated or uncertain damages;(*f*) though exceptions were sometimes made in favour of public officers who had erred in the performance of their duty, and in a few other cases.(*g*) So it was the *general* practice in an action of *trover* or *detinue* for *deeds or goods* to refuse to stay proceedings on the terms of the defendant's either bringing the deeds or goods into Court, as in the case of money, or of his delivering them up to the plaintiff and paying costs; especially if he insisted that they had been injured, or that he had sustained special damage by the detention;(*h*) saying, as to the former proposition, that they had no warehouse for the reception of goods.(*h*) And in an action against the sheriff by assignees of a bankrupt for seizing and selling the bankrupt's goods, the Court of Exchequer refused, on motion, to stay the proceedings on the sheriff's paying into Court the sum for which the goods sold, or *restoring them in specie;* there being a dispute about the value of the goods, and it being doubtful whether, by restoring them, the claimants would be placed in the same situation as before.(*i*)

The practice, however, has of late gradually changed in favour of defendants, in cases where they can return deeds or goods in their former state uninjured. Thus in a recent action of *trover* for several letters, the Court ordered the proceedings to be stayed, on the defendant delivering up to the plaintiff one of the letters addressed to him, and paying the costs of the action and application, if the plaintiff would accept the same in discharge of the action; but ordered, that if he would not accept that letter, and did not recover damages for the other letters, or should recover only nominal damages for that letter offered to be delivered up, he was to pay the costs of

(*f*) *Ante*, 684, 685.

(*g*) Tidd, 544, 545.

(*h*) Tidd, 544, 545; 3 Bing. 601; and see fully, *Earl* v. *Holderness*, 1 Moore & P. 254; 4 Bing. 462, S. C., where see a concise history of the practice.

(*i*) *Gibson* v. *Humphrey*, 2 Dowl. 68; Cromp. & M. 544, S. C.

the action. (*k*) In a recent action of *detinue* for the counterpart of a lease and other things, it was held that the Court, on delivering up a portion of them, might either stay the proceedings, or put the plaintiff under terms if he insisted on proceeding, in order to prevent his obtaining an undue advantage; (*l*) and Patteson, J. observed, "In Tidd's Prac. 9th ed. 545, a manuscript case is mentioned where *trover* was brought by the assignees of a bankrupt for a steam engine, &c. and the Court made a special rule for staying the proceedings, on delivering to the plaintiffs a part of the goods for which the action was brought, and payment of costs up to that time, provided the plaintiffs would accept thereof in discharge of the action; or otherwise that the articles delivered should be struck out of the declaration, and the plaintiffs be subject to costs, unless they should obtain a verdict for the remainder of the goods, or prove a deterioration of the part given up. On the authority of that case, I think I may interfere in the manner prayed. The rule therefore will be in this form:—That the defendant shall be at liberty to deliver up the deed in question on payment of costs up to the time of such delivery; and that the proceedings in the action shall be stayed, provided the plaintiff will accept of such discharge of such action; otherwise such deed is to be struck out of the declaration, and the plaintiff shall be subject to the costs of the action, unless he obtains a verdict for some of the other deeds in the declaration mentioned, or damages beyond nominal damages for the detention of the deed in question. The defendant, however, at all events to pay the costs of this application, and not to plead *non detinet* as to the other deeds. As it appears he claims a lien upon them against the plaintiff, he must plead his lien, and so try upon the merits." The terms of the rules in these recent decisions are fully stated in the reports, and they may be readily applied in practice to cases as they arise. It would seem further that in all cases since the 3 & 4 W. 4, c. 42, s. 21, when a defendant has it in his power to restore deeds or goods in specie, he may do so or make a tender of all that he has no lien upon or claim to, and may thereupon by summons obtain leave to pay into Court a sum sufficient to cover all possible damages for the temporary detention and any injury, and a sum sufficient to cover any expense the plaintiffs might afterwards incur in loading and carrying the goods to his own pre-

(*k*) *Earl* v. *Holderness*, 1 Moore & P. 254; 4 Bing. 462, S. C.; *ante*, vol. iii. 281.

(*l*) *Phillips* v. *Hayward*, 3 Dowl. 362. But see the report of that case in 1 Harr. & Wol. 108, S. C., from which report it would seem that the Court only interfered *by consent*. Note, the case of *Earl* v. *Holderness*, above stated, was not noticed in *Phillips* v. *Hayward*.

mises, and then plead the same with a plea of lien or other defence as to the residue of the deeds or goods; and thus *compel* a plaintiff to accept just terms, or proceed at his peril.(*m*)

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III. OF COMPOUNDING PENAL ACTIONS.(*n*)

We have seen that in a penal action for several penalties a defendant may as of course pay into Court one or more, and leave the plaintiff to proceed at his peril for the residue. But the proceeding we have here to mention is the practice of *compounding a penal action* on terms; and which can only be by *agreement* with the plaintiff, and with the approbation of the Court. That practice is principally regulated by 18 Eliz. c. 5, s. 3, which enacts that no composition shall be made until *after answer, i. e. plea,* and then only by leave of the Court; perhaps, therefore, as the defendant must *first plead,* this subject is not well arranged here. The only recent alteration in this branch of practice is that Reg. Gen. Hil. T. 2 W. 4, reg. 99, orders that "leave to compound a penal "action shall not be given in cases where part of the penalty "goes to the crown, unless *notice* shall have been given to the "proper officer; but in other cases it may."(*o*) It has been recently decided that the Court cannot dispense with an *affidavit* that the defendant *has pleaded* before they give leave to compound.(*p*) But leave may be obtained even after verdict, and even after the defendant has been charged in execution, as on the ground of his poverty and utter inability to pay the full penalties and costs.(*q*)

(*m*) And see fully *Evans* v. *Lewis*, 3 Dowl. 819.

(*n*) Tidd, 556 to 558; 2 Arch. K. B. 883.

(*o*) See prior practice, Jervis's Rules, 70, note (*n*); Tidd, 557, 558.

(*p*) *Rex* v. *Collier*, 2 Dowl. 581.

(*q*) 1 Stra. 167.

CHAPTER XXI.

OF THE PRACTICE AS TO PLEAS.

CHAP. XXI. PRACTICE AS TO PLEAS.

HAVING thus concisely examined the principal proceedings *between declaration and plea*, we have now to consider the *practice* relating to the defendant's *plea or several pleas*, and

Introductory observations.

which since the recent pleading rules of Hil. T. 4 W. 4, (requiring a *special* or *particular plea* in almost every action, excepting where by *statute* the *general issue* is permitted,) has become of increased practical importance, as more *distinctly* describing and *limiting* the precise defence on the face of the pleadings, and confining the issue and evidence to one or more single points. In actions of assumpsit and *debt on simple contract*, and in *actions on the case* in particular, the use of the general issue had become so absurdly and injuriously extended, that before the regulations alluded to, a plaintiff very frequently proceeded to trial without being apprized of the nature of the intended defence; nor could a Court or judge compel the defendant to state it; and it was consequently necessary on the one hand, that the plaintiff should come prepared to prove not only *every allegation* in his declaration and *every part* of his own case, but also on the other hand *to disprove* every possible ground of defence; and not until the trial was it discovered that the defence, perhaps, turned on a totally different and unanticipated point; and all the numerous witnesses and evidence, adduced on the part of the plaintiff at great expense, turned out wholly beside the real question or unnecessary. It will be found that the principal object of the *recent pleading rules* was to compel a defendant (at the peril of costs if unsuccessful) to *traverse* in particular any part of the declaration which he intends to dispute, and to *plead every ground of defence specially, and thereby prevent the plaintiff from being taken by surprise*; and further to cause the issue to be joined on a *single point*, thereby saving great expense in evidence, and putting an end to the introduction of several pleas, substantially stating the same ground of defence, varying only in description.

Another no inconsiderable advantage resulting from the adoption of a special plea is, that it limits the arduous and frequently perplexing duties of the judge at nisi prius, which, when a cause was tried upon a plea of general issue, were too multifarious, and such pleas properly refer to the Court in banc the legal sufficiency of the defence, which must now be stated with particularity on the record, and thus both parties retain the power of taking the opinion of the Court in banc, and afterwards of a Court of error.

I. OF THE INSTRUCTIONS FOR PLEA.

I. The first practical consideration relates to the *instructions for the plea*, comprehending also the *entire defence*. In prior pages we have seen that a very serious professional duty is imposed upon a *plaintiff's* attorney, even before the commence-

ment of an action, to obtain the most explicit instructions *to sue;* (a) and again, before declaring, to prepare *written instructions* for the declaration, comprising at least the substance of the first instructions to sue, together with a statement of any subsequent material information that can be obtained. (b) We have seen, moreover, that it may be his duty to ascertain even from the *witnesses* themselves their precise evidence in proof of the instructions; for if from want of such inquiry the action fail, the attorney may be personally liable for the consequences, or at least he may not be able to recover his fees. (c) A *similar duty* and *liability* attach upon a *defendant's attorney* as regards *instructions* to *defend* and to *plead,* and some suggestions respecting these have already been made. (d) With respect to the *instructions to plead,* it is too generally the practice to forbear to make sufficient inquiries into the facts and grounds of defence until *after* the declaration has been delivered; and the consequence is, that the defendant being then entitled only to four or eight days time to plead, depending as we have seen on the venue and his residence from London, (e) it is frequently impracticable, especially if the defendant or his witnesses reside at a distance in the country, to obtain sufficient information and prepare the plea within the limited time; and thereupon it becomes necessary to *obtain further time* as presently stated; in which case in general prejudicial terms are imposed, such as the defendant's *pleading issuably,* (thereby precluding a defendant from pleading in abatement or demurring specially,) *rejoining gratis* and taking *short notice of trial,* the latter occasioning not unfrequently disastrous hurry in preparing for trial and procuring essential evidence It is therefore advisable for a defendant's attorney, promptly after his client has been arrested or served with process, to inquire fully into the facts and evidence, and when the substance of the declaration can be anticipated, even to prepare the draft of the pleas. Experience has established the utility of this activity on the part of a defendant's attorney; and now that even in the most common actions of assumpsit and trover, special pleas stating new facts have become so frequently necessary, practitioners would soon discover the great utility of adopting this practice; and at all events avoid being under the terms of taking *short notice* either of trial or inquiry. Thus suppose an action on a bill of exchange or other contract has been

(a) *Ante*, vol. iii. 117 to 125.
(b) *Ante*, vol. iii. 429 to 431.
(c) Vol. iii. 117 to 125, 430.
(d) *Ante*, vol. iii. 121; and see a table of questions to be put by a defendant's attorney to his client, *id.* 124, note (b).
(e) *Ante*, 499.

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commenced, it is now necessary to *plead specially* and with particularity, either that the defendant received no *consideration* or any *illegality* in the consideration or contract on which it is founded; and it will not suffice to plead generally that the defendant received no consideration; but it must be pleaded affirmatively under what circumstance he became a party, as that he accepted the bill for the accommodation of the drawer, and that the latter indorsed the bill to a third party to get discounted, who had not discounted but had converted the bill to his own use; and that the plaintiff had notice of the facts when he became the holder. (*f*) It is therefore incumbent on the defendant's attorney to inquire fully into all the facts before he delivers any instructions to plead, and the investigation of such facts would frequently occupy much more time than is usually allowed for pleading, and the inquiry ought to precede instead of follow the declaration. Immediately the declaration has been delivered, it is advisable to analyze it, numbering each distinct allegation as 1, 2, 3, 4, 5, &c. in natural order, and then to inquire of the client the facts as to each allegation, and whether each be true and can be proved by the plaintiff, and how; and if not, then the evidence by which it can be disproved: and having thus gone through the whole declaration, then inquiry is to be made into any *new facts* or circumstances which it is supposed may constitute distinct answers or defences, and how each can be established in evidence, and the *witnesses* themselves should be examined.

II. EXTENT OF DUTY OF DEFENDANT'S ATTORNEY TO OBSERVE HIS INSTRUCTIONS AND WHAT TO PLEAD.

II. A defendant's attorney should communicate *personally* with his client, and not merely by letter, or through the intervention of a clerk or *any third person*, and give him his best advice upon the proper course of defence to be adopted. (*g*) His duty to the Court, and indeed to himself, are so far paramount to the duty to his client, that he cannot be sued for not pleading a vexatious sham plea pursuant to his client's request; (*h*) nor perhaps for not moving the Court in respect of a supposed irregularity by which his client was not really prejudiced; (*i*) and where an attorney pleaded a false plea of set-off upon a recognizance, the Court on motion set aside such plea, and gave leave to the plaintiff to sign judgment, and made the attorney pay the costs, although it was sworn that the plea was pleaded in pursuance of the *express directions* of his client, (*k*)

(*f*) See the notes to the Pleadings, Rules Hil. T. 4 W. 4, *post*, 724, &c.

(*g*) *Hopkinson* v. *Smith*, 1 Bing. 13; 7 Moore, 237; and see *In re Garbutt*, 9 Moore, 157, 2 Bing. 74; *Taylor* v. *Glassbrook*, 3 Stark. 75.

(*h*) *Lee* v. *Ayrton*, 1 Peake, 119.

(*i*) *Godfrey* v. *Jay*, 3 Car. & P. 192; 6 Bing. 616, S. C.

(*k*) *Vincent* v. *Groome*, 1 Chitty's Rep. 182.

and as the insolvent act, 7 G. 4, c. 57, sect. 49, enacts, that if an insolvent praying his discharge shall have put any of his or her creditors to any unnecessary expense *by any vexatious or frivolous defence or delay to any suit for recovering any debt* or sum of money from him, the Court may direct his imprisonment as to that creditor's claim, to continue for not exceeding two years, it will obviously be advisable, where there is the least probability of the client becoming insolvent, to caution him against any plea or course of defence that might endanger him under that enactment. (*k*) If there be any reasonable doubt upon the propriety or expediency of any particular plea or line of defence, then an attorney, by acting under the opinion of counsel, will in general be sufficiently protected from personal liability, and however incorrect the opinion may turn out to have been, the attorney might even recover his fees. (*l*)

What defence or plea may be pleaded or advanced.

The full instructions for the defence having been obtained, the next consideration is, *what defence* shall be advanced, as whether it shall only be *on the merits* in the common acceptation of that term, i. e. on the *moral justice* of the case, or whether a *legal objection* on account of some *illegality* in the consideration or contract, or want of formality and noncompliance with some legal requisite at common law, or under the statute against frauds, shall be taken; or lastly, whether a mere *technical objection*, principally connected with practice or the pleadings, shall or not be raised. As a general rule, undoubtedly an attorney ought to consult his client's wishes before he sets up a defence, which may in the sequel prejudice his character in the estimation even of a few. As regards *legal* objections and defences in general, however, the late Lord Tenterden declared that sitting in a Court of law, he should feel it his duty not to suffer an argument by counsel to a jury that the defence of *usury* or *gaming* is unjust or dishonourable, to prejudice a jury against such defence, still less to induce them to find a verdict contrary to the evidence. And in a late case in the House of Lords, the Lord Chancellor, speaking of *legal* or *technical objections*, and of the propriety or impropriety of a party taking advantage of them, and in particular of a *defect in the execution of a power*, said, (*m*) "Nothing can be more unjust than to "throw any imputation whatever against the gentleman who "has taken advantage of the law of the land as it is. He is "not bound to forego that advantage; he is not only not bound "to forego that advantage, but unless he be a person to whom

(*k*) And see *ante*, vol. iii. 125, in note.

(*l*) *Potts* v. *Sparrow*, 6 Car. & P. 749; *Godfrey* v. *Jay*, 6 Bing. 616; 1 Moor & P. 236; *Kemp* v. *Bart*, 1 Nev. & Man. 262; 4 Bar. & Adol. 424, S. C.; *ante*, vol. ii. 32, 33.

(*m*) *Cockerell and others* v. *Cholmeley*, 1 Clark & Fin. 70, 71.

many thousands of pounds are a matter of no importance as "regards either his own interests or the interest of his family, "it would be a piece of romantic folly, in my opinion, for him "to forego that advantage which the law of the land has given "him. Many who have no occasion for money for their fami- "lies, either from having enough of it themselves, or their "families being well provided for, may afford to be *generous* "to others; for it is pure *generosity* in the way to which I "have referred; but no man is to be blamed for wanting the "means to be thus generous. Is it possible to think of blam- "ing any person merely because he is not guilty of an act of "romantic generosity? an act which, in the circumstances of "this respondent, who is stated to be a gentleman with a "family, would, in all probability, have been an act of folly, "disentitling him to praise, and probably subjecting him to "censure." It is to be observed, however, that in that very case the chancellor recommended the lords not to give the party who took the objection any costs. And every independent and honourable solicitor will remind his client, that whatever may almost of necessity be said in Courts of justice in upholding and giving effect to the prescribed law, still there may be a different opinion entertained by society of the moral propriety of many *legal* defences tending to defeat natural justice in the particular case, and the consideration of which will induce such solicitor to advise his client not to adopt such defence, and sometimes even to decline to conduct it.

Considerations whether to plead or suffer judgment by default.

Having obtained full instructions for the defence and plea, the first consideration will be whether it will be advisable to plead, or suffer judgment by default, at least in those actions where it is not permitted to pay money into Court under 3 & 4 W. 4, c. 42, s. 21, or when the defendant is not prepared to do so. In actions for torts, when the amount of the damages is uncertain and greatly in the discretion of a jury, as in an action for a libel, or slander, or criminal conversation, or debauching a daughter, although there may not strictly be any defence, yet it may be advisable to plead and try the action before one of the judges of the Courts at Westminster and a superior jury; principally in the hope that the judge's authority and moderating influence will deter the jury from giving (as a *sheriff's jury* will sometimes do) *outrageous damages*. But considerations of this nature, being mere matters of prudence, frequently depend on the particular circumstances of each case.

Occasional conduct on behalf of a defendant collateral to pleading.

On *the part of a defendant*, supposing that an action is threatened or pending for the price of goods or for work and materials, and the defence is either to the whole or to reduce

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the claim, on the ground that the goods are not equal to the warranty, (n) or the work and materials improperly executed, or inferior; (o) then it may be advisable for the defendant to give a full written notice of such objection according to the facts, (p) and further to place the money sufficient to cover the whole of the just claim in a banker or third person's hands, and give notice that it is there ready to be paid over if the plaintiff will accept the same. Such notice and offer afterwards proved on the trial will probably incline a jury in favour of the defence, as being bona fide, and will at all events preclude any argument that the defence is merely for delay.

III. TIMES OF PLEADING AND OF IMPARLANCES HOW FAR ABOLISHED.

III. Before the uniformity of process act, 2 W. 4, c. 39, unless the plaintiff declared upwards of a certain number of days before the end of a term, the defendant, (provided he had duly appeared and perfected bail in a bailable action, but not otherwise, (q)) was entitled to an *imparlance*, i. e. could not be required with effect to plead before the next term, and sometimes even till a third term, and many ancient as well as modern rules and numerous decisions will be found on the subject of *imparlances*. And for some time after passing that act it was supposed that in some cases the right to an imparlance still subsisted; (r) but now upon conferance between all the judges, it is settled, that as the statute sect. 11, enables a plaintiff to proceed as well in the vacations as in the terms, (excepting between the 10th of August, and 24th of October, (s)) and excepting a few other days, (t) in all *personal* actions *originally commenced* in one of the superior Courts the right to an imparlance in any such action is *virtually annulled.* (u) But as that act does not extend to real or mixed actions, such as quare impedit and ejectment, nor to actions of replevin, or other actions when removed from a County Court or other inferior Court, nor to proceedings on scire facias, there may still be occasion to refer to the ancient learning on the subject of imparlances. (x) Excepting therefore in those few cases, a defendant cannot claim an imparlance, but must plead within four or eight days, as shown in a prior page and as presently stated, or he must *obtain further time* by consent or by order of a judge.

Of suggestions

The Reg. Gen. Hil. T. 2 W. 4, reg. I. s. 109, ordered that

(n) See *Street* v. *Blay*, 2 B. & Ad. 456.

(o) *Basten* v. *Butter*, 7 East, 479.

(p) See form, *Basten* v. *Butter*, 7 East, 479; and *Street* v. *Blay*, 2 Bar. & Ad. 456.

(q) *Cook* v. *Allen*, 3 Tyrw. 378.

(r) *Whalley* v. *Barnett*, 3 Tyrw. 239; *Edensor* v. *Hoffman*, 2 Crom. & J. 140.

(s) *Ante*, vol. iii. 103, 104; *Nurse* v. *Geeting*, 3 Dowl. 157, 158; *Wigley* v. *Tomlins*, id. 7; 9 Legal Observer, 22, 226; Atherton on Rules, 107.

(t) *Trinder* v. *Smedley*, 3 Dowl. 87.

(u) *Supra*, note (s).

(x) Tidd's Supp. A. D. 1833, p. 127; and as to the previous law of imparlance, Tidd, 9th ed. 462.

it shall not be *necessary* that imparlances should be entered on any distinct roll; (y) and Reg. Gen. Hil. T. 4 W. 4, reg. 2, (the practice rules) direct, that "no entry of *continuances* by "way of *imparlance, curia advisari vult, vicecomes non misit* "*breve*, or otherwise, *shall be made* upon any *record* or *roll* "whatever, or in the *pleadings*, except the jurata ponitur in "respectu, which is to be retained, provided that such regula- "tion shall not alter or affect any existing rules of practice as "to the *times* of proceeding in the cause, provided also that in "all cases in which a plea puis darrein continuance is now by "law pleadable in banc or at nisi prius the same defence may "be pleaded with an allegation that the matter arose *after the* "*last pleading* or the issuing of the jury process, as the case "may be, provided also that no such plea shall be allowed "unless accompanied by an affidavit that the matter thereof "arose within eight days next before the pleading of such "plea, or unless the Court or a judge shall otherwise order." Since this last rule, although there is not to be in personal actions any formal statement in pleading or otherwise of an *imparlance* or other continuance, and it would be untechnical to call any pleading after issue joined a plea *puis darrein continuance*, yet when since the last pleading or act in Court a death or change of the attorney or other event has occurred, which it may be necessary or prudent or convenient to suggest or state on the record, pursuant to the statute 8 & 9 W. 3, c. 11, sect. 7, it must still be stated at the head of the *next* pleading, whether declaration, plea, replication, &c. by some convenient and concise allegation, (z) as in the commencement of a plea, immediately after the date at the top, thus, "and the defendant "saith that since the said plaintiff declared in this action and "before this day, to wit, on, &c. the said G. H., (one of the "plaintiffs,) died; and the defendant further says, that the "said A. B., who hath survived the said G. H., ought not to "have or maintain his aforesaid action thereof against him, "because he says, &c.," (stating the matter of the plea as usual.) (z)

On the record in lieu of entry of imparlances or continuance.

Suggested statement of a death, &c. since last pleading.

In examining the requisites of the *notice to plead* we have necessarily anticipated much of this part of the subject. The *notice to plead* should require the defendant to plead within *four days* if the venue be laid in London or Middlesex, and

The usual times of pleading.

(y) Jervis's Rules, 72, note (g).

(z) See Chitty's Col. Stat. tit. Abatement, page 2, note (e), and another form there given; see a statement of the death of a party after issuing the writ and before declaration, 2 Chitty on Pleading, 6th edit. page 15; 2 Dowl. 436.

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the defendant resides within twenty miles of London; but within *eight days* if the venue be laid in any other county *or* the defendant resides above twenty miles from London; and which four or eight days are reckoned *exclusive* of the day of giving the notice, and *inclusive* of the last of the four or eight days; (*a*) but if the last of the four or eight days expire on a Sunday, Christmas-day, Good-Friday, or a day appointed for a public fast or thanksgiving, then the defendant has the whole of the next day to plead; (*b*) and if the four or eight days or any part of *enlarged* time expire between the 10th of August and the 24th of October, then the defendant is not obliged to plead until the like number of days have elapsed after the 24th of October. (*c*) We have also seen that judgment cannot be regularly signed for want of a plea until the *afternoon* of the fifth or ninth day; (*d*) and as in the Exchequer the office is not open as of course in the afternoon during the *vacations*, a defendant, pending a vacation, has full five or nine days, subject to the risk of the office being opened specially in the afternoon of the fifth or ninth day, as it may be, on paying an extra fee. (*d*)

Within such four or eight days, thus depending on venue and the residence of the defendant, he must plead *in bar*, (*e*) or take care before the expiration of the time to obtain an order for further time, or at least the first summons should be returnable before the time for pleading has expired, and he should regularly attend the same. And all pleas in *abatement* must be pleaded within *four days*, both inclusive, from the day of delivering the declaration, or if filed, of the notice of declaration; and the rule of Easter Term, 5 Ann. K. B. directs that after such four days such plea shall *not be received*, but may be treated as a nullity and judgment signed as for want of a plea; and if a plea in abatement to part, and in bar as to the residue, be delivered after the four days have elapsed, the whole may be treated as a nullity. (*f*) If however a notice to plead give more time than the defendant would be entitled to in respect of the venue or his residence, then we have seen that he may take the whole time so given by the plaintiff's own act to plead *in bar*. (*g*)

After delivery of particulars.

The Reg. Gen. Hil. T. 2 W. 4, reg. 48, orders that a de-

(*a*) *Ante*, 499 to 501. In K. B. Reg. Gen. Trin. 5 & 6 G. 2. In C. P. Reg. East. 3 G. 2.
(*b*) Reg. Gen. Hil. T. 2 W. 4, r. VIII.
(*c*) *Trinder* v. *Smedley*, 3 Dowl. 87.
(*d*) *Kemp* v. *Fyson*, 3 Dowl. 265.
(*e*) *Ante*, 499 to 501.
(*f*) *Ante*, 500, note (*d*); *Martindale* v. *Harding*, 1 Chitty's Rep. 716; *Lee* v. *Carlton*, 3 T. R. 642; *Macdonnell* v. *Macdonnell*, 3 Bos. & Pul. 174.
(*g*) *Ante*, 499.

fendant shall be allowed the same time for pleading *after the delivery of particulars* under a judge's order, which he had at the return of the summons: nevertheless judgment shall not be signed till the *afternoon* of the day after the delivery of the particulars unless otherwise ordered by the judge. This rule assimilated the practice of C. P. to that of K. B. and allows till the afternoon of the day after the delivery of particulars at all events. (*h*)

Prisoners.

With respect to *prisoners* in actual custody the Reg. Gen. Trin. T. 3 W. 4, expressly orders that the defendant shall plead to the declaration, at the same time, in the same manner, and subject to the same rules, as in actions against defendants who are not in custody; and we have seen that it has been held that he must plead without a notice to plead. (*i*)

Before what hour of night to be delivered.

We have seen that Reg. Gen. Hil. T. 2 W. 4, reg. 50, requires the service of all rules, orders, and motions, *before nine o'clock at night*, and imports, that if served after that hour the service shall not be deemed good; (*k*) and the particular Reg. Mich. T. 1 W. 4, reg. 9, in Exchequer is to the same effect. But it has been held that a plea delivered after nine o'clock in the evening and kept by the plaintiff cannot be treated as a nullity; and a judgment signed on that ground and no notice having been given to the defendant of the objection was set aside. (*l*)

IV. OF OBTAINING FURTHER TIME TO PLEAD.

IV. *Further time* to plead may be obtained, not only *in bar*, but in some cases by special leave even *in abatement* after the allowed time of four days; as where two actions had been vexatiously brought for the same cause, in which case the Court allowed the defendant to plead in abatement after the four days had elapsed; (*m*) and a plea of the nonjoinder of a co-contractor was also permitted after the four days, that also being considered a plea in abatement more to be favoured than those which constitute a mere formal objection. (*n*) However, when it is proposed to plead in abatement after the usual time, there should in general be a special application supported by an affidavit showing just ground for requesting the favour and swearing to a sufficient defence on the merits when practicable.

To plead in abatement.

(*h*) Jervis's Rules, 55, note (*x*); and Tidd, 598.

(*i*) *Clementson* v. *Williams*, 1 Bing. N. C. 356; *ante*, 498; 2 Dowl. 212.

(*k*) *Ante*, vol. iii. 110.

(*l*) *Horsley* v. *Purdon*, 2 Dowl. 228; but see *ante*, 110, note (*k*).

(*m*) *Sowter* v. *Dunston*, 1 Man. & Ryl. 508, 510.

(*n*) *Id. ibid.*; 2 Arch. K. B. 4th ed. 545.

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In what cases time given to plead *in bar*, and what length of time, and on what terms.

We have seen that the Courts have given further time to plead in bar in order to enable a defendant in the mean time to file a bill and obtain a discovery in equity, (*o*) and that in an action for words imputing murder or felony the Courts have given time to plead until after an expected trial of an indictment for such supposed felony. (*p*) In a recent case, where the master of a ship was served with process in an action on the eve of his departure with material witnesses on a foreign voyage, viz. to the whale fisheries, and a judge had made an order for *twelve months'* time to plead, on the ground that neither the defendant nor the witnesses would sooner return, the Court refused to rescind the order under the particular circumstances, though as a general practice the time might be unreasonable. (*q*) It would be advisable when any considerable time is prayed on behalf of a defendant to request that it be granted only on the terms that the death of the plaintiff if not also of himself shall not abate the suit, for otherwise the costs of action may be lost. (*r*)

How the time is calculated.

The day of the date of the order for time to plead is to be excluded since Reg. Gen. H. T. 2 W. 4, reg. VIII.; (*s*) and if a defendant obtain enlarged time for pleading previous to the 10th August, but which does not expire on or before that day, he is entitled to the remainder of the enlarged time after the 24th of October for the purpose of pleading. (*t*) Three months' time to plead are construed as lunar, not calendar, (*u*) and if the order be for time to plead *until* a named day, that day is to be included in the time to plead, and the defendant has the whole of that day in which to deliver his plea. (*x*) It was held that if a defendant, having obtained an order for enlarged time, file his plea before it was requisite to do so, he cannot rule the plaintiff to reply unless he have previously given the plaintiff notice of his having so filed his plea; (*y*) but as pleas must now be delivered such a point can scarcely arise.

Order for time how obtained.

Time to plead may be obtained by motion and rule, or by

(*o*) *Ante*, 628; *Whitter* v. *Gazalet*, 2 T. R. 683.

(*p*) *Ante*, 628, 629; *Sibson* v. *Nivin*, Barnes, 224; and see *Dicken* v. *Praed*, 4 Taunt. 825.

(*q*) *Hunt* v. *Barclay*, 1 Hodges' Rep. 103; 3 Dowl. 646; *semble* terms ought to have been imposed, as providing for *death*, &c.

(*r*) See terms of allowing to a defendant a new trial, *Griffith* v. *Williams*, 1 Cromp. & J. 47; and *Calvert* v. *Tomlin*, 5 Bing. 1.

(*s*) That rule virtually annuls the decisions that both days are inclusive, in *Kay* v. *Whitehead*, 2 Hen. Bla. 35; *Freeman* v. *Jackson*, 1 Bos. & P. 480.

(*t*) *Trinder* v. *Smedley*, 3 Dowl. 87.

(*u*) *Soper* v. *Curtis*, 2 Dowl. 237.

(*x*) *Dakins* v. *Wagner*, 3 Dowl. 535.

(*y*) *Gaudy* v. *Borrowdale*, 1 New Rep. 273.

summons and order of a judge; but the latter is now the constant practice, and a summons waives the necessity for a rule to plead.(z) When time to plead is given upon a first application, long before the sittings after term in a town cause, and long before the assizes in a country cause, it is not usual to impose any terms; and the plaintiff's attorney, before the time when the summons is returnable, indorses his consent to a few days time. But when an early trial might otherwise be lost, it is of course in the judge's order for time to impose terms which vary; sometimes the words of the order are generally "*on the usual terms;*" but more usually certain terms are specified, as "pleading issuably, rejoining gratis, and taking short notice of trial." But other terms may be added or those varied; and in an action against an executor or administrator the judge will frequently, at the instance of the plaintiff, impose the terms that the defendant shall not plead any judgment obtained by another creditor since the time for pleading expired;(*a*) and he may, as a condition, order that the defendant shall plead between 10th of August and 24th of October, notwithstanding the statute and rule. Full forms of summons and order are stated in the note.(*b*)

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"Usual terms," meaning of those words in an order for time.

The words "*usual terms*" mean pleading issuably, rejoining gratis, and taking short notice of trial.(*c*) If a defendant have

(z) 3 Dowl. 579.
(*a*) Anonymous, 8 Mod. 308; *Hughes* v. *Pellett*, Barnes, 330.

Summons for time to plead.

B. *v.* D. (*b*) Let the plaintiff's attorney or agent attend me at my chambers in Serjeants' Inn to-morrow, [*or* "on ——"] at —— of the clock in the forenoon, [*or* "afternoon"] to show cause why the defendant should not have a week's [*or* "month's"] time to plead. Dated this —— day of ——, A. D. 1835.
[*Judge's signature.*]

Comprehensive form of order thereon.

B. *agt.* D. Upon hearing the attornies or agents on both sides I order that the defendant [without prejudice to any application to change the venue] have ["a week" *or* "ten days" *or* "a month's"] further time to plead [after a delivery of particulars]; he pleading ["if in abatement only nonjoinder of a contractor,"] and rejoining issuably [to the *merits*,*] rejoining gratis [*or* "rejoining gratis in two days,"†] and joining in demurrer gratis,‡ taking short notice of trial for the first sittings in the next term [*or* "for the assizes,"] or even two days' notice of the latter§ if necessary, and short notice of inquiry‖ [*and terms may be subtracted or added as agreed by the parties or ordered by the judge.*] Dated this —— day of ——, A. D. 1835.
[*Judge's signature.*]

* See *Holmes* v. *Grant*, 1 Gale, 59; 3 Dowl. 497.
† Suggested by Bayley, B. in *Clark* v. *Adams*, 2 Tyr. 756.
‡ Essential, as not being implied, *Jones* v. *Key*, 2 Cr. & M. 340; 4 Tyr. 238.
§ *Per cur.* in *Lawson* v. *Robinson*, 3 Tyr. 490, *post.*
‖ Necessary as not implied, *Stevens* v. *Pell*, 2 Cr. & M. 421; 2 Tyrw. 267; 2 Dowl. 355.

(*c*) Tidd, 471; 1 Sellon, 807; 1 Arch. K. B., 4th ed. 239.

obtained an order for time *on the "usual terms"* he cannot afterwards move to change the venue; and therefore if it be intended to make that application care should be observed before being subjected to the *usual terms*, to have the order for time drawn up expressly without prejudice to an application to change the venue.(*d*)

Construction of the terms *pleading issuably*.(*e*)

The term "*issuably*," as here used, is of rather uncertain meaning; for it does not confine the defendant to a plea to be tried by a *jury*; and a *general demurrer*, where there is a substantial and not a *mere formal* defect in the declaration or other pleading, is certainly admissible, though it is to be decided upon by the *Court*.(*f*) Nor does it import that the defendant shall only plead "a plea in chief to the *merits*," or a *meritorious* plea;(*g*) for certainly a defendant under such terms may plead most pleas of *illegality*, as ease and favour to a bail bond,(*h*) and a plea of the statute of limitations is also admissible.(*i*) So that upon the whole it may be concluded that any *substantial* matter of fact or law that would *perpetually bar* the action may be pleaded or raised by demurrer by a defendant under such terms. In other words, as observed by Abbot, C. J., "where he has obtained time to plead on the "terms of pleading issuably, and by his pleading fails to bring "the *merits* (i. e. *legal* merits) of the case or some question of "*fact* or some question of *law* arising on the facts in issue, "he does not comply with the conditions of the order."(*k*)

A plea in abatement which does not *finally* decide on the rights of the parties,(*l*) or a plea of alien enemy, which is considered only a temporary bar during the war,(*m*) or a false plea of judgment recovered,(*n*) are certainly violations of the terms.

What such a plea or not.

Pleading issuably, however, does not mean that the *plaintiff* is to be permitted to have a double or other improper replication; and therefore where a defendant, being under such terms, demurred specially to the replication for duplicity, and thereupon the plaintiff signed judgment, the Court made absolute a rule for setting aside such judgment, and ordered the demurrer

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(*d*) *Waring* v. *Holt*, 3 Price, 3; 2 M'Clel. & Y. 106, 202; *Bagnell* v. *Shipham*, 1 Cromp. & Jer. 377.

(*e*) See in general Tidd, 9th ed. 471.

(*f*) *Wright* v. *Russell*, 3 Wils. 530; 2 Bla. R. 923, S. C.; *Dewey* v. *Sopp*, 2 Stra. 1185.

(*g*) N. B. The definition in Tidd's Prac. 9th ed. 471, and in reported cases, must be understood *legal* merits; so that a plea of *gaming*, *usury*, &c. is an *issuable* plea.

(*h*) *Dearden* v. *Holden*, 1 Burr. 605.

(*i*) *Rucker* v. *Hannay*, 4 East, 604.

(*k*) *Sawtell* v. *Gillard*, 5 Dowl. & R. 620.

(*l*) *Kilwick* v. *Maidman*, 1 Burr. 59.

(*m*) *Simeon* v. *Thompson*, 8 T. R. 71.

(*n*) *Heron* v. *Heron*, 1 Bla. R. 376.

to be argued; but then as the defendant ought not to have demurred *specially* without previous leave he was ordered to pay the costs of the motion. (o) If a defendant sued as administrator, being under terms of pleading issuably, plead the general issue and his own bankruptcy, which is obviously a bad plea, and no answer to the action, the plaintiff may sign judgment. (p)

In one case the Court of Exchequer thought that a *special* demurrer to a replication de injuria, on the ground that it put in issue too many facts, was a fair demurrer, and that the defendant, though under terms, was not precluded from so demurring; (q) but subsequently, upon that decision being cited, Bayley B. said "a *special* demurrer is not an issuable plea; "but if there are *good* causes (i. e. semble "*substantial*") the "Court will sometimes strike out the causes." (r) In a subsequent case, the defendant being under terms of pleading issuably, the plaintiff improperly replied double, upon which the defendant demurred specially for duplicity, and the plaintiff signed judgment, the Court said that it could not have been intended that the plaintiff should be allowed to reply double, and they therefore set aside the judgment, and ordered all the special causes of demurrer to be set aside, excepting that for duplicity, which they directed should be argued on the next paper day; but as the defendant ought not to have demurred specially without leave, the Court declared he must pay the costs of the rule. (s) Where the objection assigned specially as cause of demurrer is merely technical, and would have been aided by the statute 4 Ann. c. 16, s. 1, then certainly the assigning such technical objections seems obviously a violation of the intent of the order; but the mere specially assigning as a cause of demurrer a *substantial* defect, which would defeat the action on a judgment by default, or on motion in arrest of judgment, ought not to be so considered. Indeed as the practical rules of Hil. T. 4 W. 4, reg. 2, now require that the substantial objection shall be stated in the *margin* of *every* demurrer, whether general or special, it seems immaterial that it also be shown as cause at the conclusion of the demurrer itself. Upon the whole, if a declaration or a replication be so objectionable as to prejudice or embarrass the defendant, his safest course, where under terms of pleading issuably, is immediately to return it to the plaintiff's attorney, with a request that he

(o) *Gisborne* v. *Wyatt*, 1 Gale, 35; 3 Dowl. 505.

(p) *Searle* v. *Bradshaw*, 2 Crom. & M. 148; 2 Dowl. 289.

(q) *Langford* v. *Waghorn*, 7 Price, 670.

(r) *Nanney* v. *Kenrick*, 1 Dowl. 609; *Berry* v. *Anderson*, 7 Term R. 530.

(s) *Gisborne* v. *Wyatt*, 3 Dowl. 505; 1 Gale, 35.

will alter it, and if he refuse, then a summons should be promptly obtained in the alternative, either that the plaintiff shall amend, or the defendant have leave to demur specially.

In the King's Bench the terms pleading issuably extend throughout the suit; and therefore the defendant when under them cannot demur for want of form to the replication.(t) But in C. P. the condition has been considered confined to the plea, and that therefore the defendant may demur specially to the replication;(u) and therefore it may be advisable for a plaintiff to pray that an order, when obtained in C. P., may require the defendant to rejoin issuably; but even then the defendant may plead matter in abatement arising pending the action, unless expressly prohibited.(x)

If the plea, or one of several, be manifestly in violation of the prescribed terms, the plaintiff, after the time for pleading has elapsed, but not before, may treat the whole as a nullity, and sign judgment;(y) so if there be an unfounded or a mere technical demurrer to the whole, or to a part, and an issuable plea to the residue.(z) But if the plea be merely informal, the plaintiff may demur, though he cannot sign judgment;(a) and it is always recommended in cases of the least doubt to apply to the Court or judge for leave to sign judgment;(b) or rather immediately reply, if an issue can be readily taken upon a question of fact that it is known must be found in the plaintiff's favour.

Rejoining gratis.(c)

By the terms of "*rejoining gratis*" is meant not only the dispensation with the rule to rejoin, but also with the four days time given by it, or as has been well expressed, not only with the rule itself but its consequences;(d) the defendant's undertaking to rejoin *gratis* renders it incumbent on him to deliver to the plaintiff's attorney his rejoinder *within twenty-four hours after* it is demanded; and as the plaintiff may demand a rejoinder immediately after, or at the time he delivers his replication, the defendant in that case must, within twenty-four hours after he has received the replication, deliver his rejoinder.(e) But still a *demand* of rejoinder twenty-four hours before judgment will be indispensable.(f) If a defendant object to such terms he may, on praying time to plead, have the

(t) *Sawtell* v. *Gillard*, 5 Dowl. & R. 620.

(u) *Betts* v. *Applegarth*, 4 Bing. 267.

(x) *Bryant* v. *Perring*, 5 Bing. 414.

(y) *Serle* v. *Bradshaw*, 2 Crom. & M. 148; *Waterfall* v. *Glode*, 3 Term R. 305; *Cuming* v. *Sharland*, 1 East, 411.

(z) *Id.*; *Sutton* v. *Waddelove*, Barnes, 314.

(a) *Thellusson* v. *Smith*, 5 T. R. 152.

(b) Tidd, 9th ed. 473; 1 Arch. K. B. 4th ed. 240.

(c) See in general, Tidd, 472.

(d) 1 Arch. K. B. 4th ed. 240; *Wye* v. *Fisher*, 3 Bos. & P. 443.

(e) 1 Arch. K. B. 4th ed. 240, note (i); *Clarke* v. *Adams*, 2 Cr. & J. 683; 2 Tyr. 755; *Jones* v. *Key*, 2 Dowl. 265.

(f) *Seaton* v. *Skey*, 1 Harr. & Woll. 219; 3 Dowl. 537, S. C.; in the last report *non pros* is misprinted for *nil dicit*.

order varied, as "rejoining gratis *in two days;*" and this seems a desirable qualification.(*f*)

A defendant when under terms to "*rejoin gratis*" is not bound to *join in demurrer* within twenty-four hours after demand of such joinder, but is entitled to the usual four days rule; because a defendant may join issue to the country without the consideration that may be necessary before joining in demurrer.(*g*) The terms of joining in *demurrer* gratis should therefore be imposed on a defendant when the plaintiff apprehends that it may become necessary to demur, and join in demurrer in sufficient time to obtain judgment of a particular term, especially in Trinity Term.(*g*)

Taking short notice of trial.

The terms of "*taking short notice of trial*" import in a town cause that *two days notice* of trial, the one day inclusive the other exclusive, shall suffice, provided the intermediate day be not a Sunday;(*h*) but it is usual to give, and it would be as well in the order to provide that as much longer time shall be given as conveniently practicable (*i*) If the terms be to take short notice of trial for the sittings in term, the defendant is not bound to take short notice of trial for the sittings *after* term.(*k*) In a country cause short notice of trial means four days notice, exclusive of an intermediate Sunday,(*l*) and to be given four days at least before the commission day, the one exclusive the other inclusive;(*m*) and the defendant's delay in delivering his rejoinder will not constitute any excuse for not giving such full *four* days notice; for it was incumbent on plaintiff's attorney, when before the judge on the summons for time to plead, to have saved the assizes; by stipulating that if the issue for trial was not raised in time to give the regular four days notice, then *two days* notice should be sufficient.(*n*) The defendant's being under terms to take short notice of trial does not entitle the plaintiff to give less than the usual notice of *countermand;*(*o*) and in which notice of countermand it has been supposed that even a Sunday may be reckoned, because

(*f*) *Per* Lord Lyndhurst, C. B and Bayley, B. in *Clarke* v. *Adams*, 2 Tyr. 756.

(*g*) *Jones* v. *Key*, 4 Tyrw. 238, 2 Cromp. & M. 340; 2 Dowl 265, S C

(*h*) *Grojean* v. *Manning*, 2 Tyr. 725, 2 Cromp. & Jerv. 635, S. C, but note a case of *continuance* of notice of trial, see also *Butler* v. *Johnson*, Barnes, 301, Prac. Reg. 390, Dax, Prac. 74, Price, Pr. 276.

(*i*) *Semble*, Tidd, 9th ed. 472, *Price* v. *Simpson*, 1 Taunt. 343.

(*k*) *Abbott* v. *Abbott*, 7 Taunt. 452; 1 Moore, 160, S. C., Tidd, 757, Dax, Pr. 74

(*l*) Reg Gen. Hil T 2 W 4, reg. 58, Jervis's Rules, 57, note (*h*), *Grojean* v. *Manning*, 2 Tyr 725, 2 Cromp & J 635, S. C.

(*m*) R L. 30 G 3, Reg. Gen. Hil. 2 W. 4, r. VIII., *Lawson* v. *Robinson*, 3 Tyr. 490, 3 Term R 660, *Butler* v. *Johnson*, Barnes, 301

(*n*) *Lawson* v. *Robinson*, 3 Tyr. 490, Cromp. & M. 499, S. C., and see same principle, *King* v. *Jones*, Cromp. & M. 71.

(*o*) *King* v *Jones*, 1 Cr. & M. 71, 1 Dowl. 640, S. C.

it requires no act to *be done* by the opponent, but suspends all proceedings; but he has to inform his witnesses, to prevent increase of expense, and for that purpose Sunday is not a proper day. (*p*)

When a defendant is under terms of taking short notice *of trial* he is not bound to take short notice of *inquiry;* and therefore a plaintiff's attorney should always endeavour to have that condition inserted in an order for time, and as in the antecedent note. (*q*)

Time in order how calculated

The day of the date of the order, or the *first* day, is to be *excluded* in the computation of the time given; and if judgment be signed too soon, though the plea be irregular, it will be set aside. (*r*) So "seven days" time for pleading gives the *whole* of the seventh day to plead in, after excluding the day on which the order is made; (*r*) and an order for time *until* a named day includes that day. (*s*)

How soon plaintiff may sign judgment as for want of a plea. (*t*)

If a defendant plead an irregular or insufficient plea before the original or enlarged time for pleading has expired, still the plaintiff cannot sign judgment until the whole time has expired; because the defendant might discover his mistake, and in due time deliver another perfect plea; and this, notwithstanding the Reg. Gen. Hil. T. 2 W. 4, s. 40, now prevents a defendant from waiving his plea without leave. (*u*) So if a plea in bar, requiring counsel's signature, be delivered without such signature, still the plaintiff must wait till the full time for pleading has expired; (*x*) and a plea *in bar* delivered after the time for pleading has expired, but before judgment signed, renders a judgment signed after notice of such plea irregular; and it will be set aside with costs, to be paid by plaintiff's attorney. (*y*)

V. *Practice as to Pleas.* *Taking declaration out of office when filed.*

Before the defendant can regularly plead, he must take the declaration, when it has been filed by the plaintiff, out of the office, and at the same time pay the fees at such office; (*z*) and if he plead without so doing, even having obtained a copy of the declaration from the plaintiff's attorney, the latter may

(*p*) Tidd, 735; but see *Grojean* v. *Manning*, 2 Tyr. 725; 2 Cromp. & J. 635.

(*q*) *Ante*, 705, (*b*); *Stevens* v. *Pell*, 2 Cromp. & M. 421; 4 Tyr. 267; 2 Dowl. 355, S. C.

(*r*) *Pepperell* v. *Burrell*, 1 Cr. M. & Ros. 372; 2 Dowl. 674; 4 Tyr. 811, S. C.

(*s*) *Ante*, 704, (*x*).

(*t*) See in general 1 Arch. K. B. 241, and *ante*, 704.

(*u*) *Dakins* v. *Wagner*, 3 Dowl. 535.

(*x*) *Nolleken* v. *Severn*, 2 Crom. & J. 333; 1 Dowl. 321; *Pepperell* v. *Burrell*, 1 Crom. M. & Ros. 372; 2 Dowl. 674; *Macher* v. *Billing*, 3 Dowl. 246; 4 Tyr. 812.

(*y*) *Amphlett* v. *Semple*, 2 Tyrw. 312; 2 Crom. & J. 358.

(*z*) *White* v. *Dent*, 1 Bos. & Pul. 341; 1 Arch. K. B. 228.

treat the plea as a nullity, and sign judgment as for want of a plea, and without any previous demand.(z) However, as taking the declaration out of the office waives all objections to the process,(a) and any variance between the notice of the declaration and the declaration itself,(b) and also to the declaration having been filed conditionally instead of absolutely,(c) the defendant's attorney must, before he takes the declaration out of the office, well consider whether any objection is to be taken on account of either of these proceedings.

Practice relating to pleas *in abatement.* (d)

As pleas in abatement must be delivered within four days, both inclusive, after the delivery of the declaration, the practice relating to them first demands consideration. These are principally affected by the general acts 4 Ann. c. 16, s. 11, 9 G. 4, c. 14, s. 2, and 3 & 4 W. 4, c. 42, s. 8, 9, 10, 11 and 12. Pleas in abatement do not appear to have been scarcely noticed by any modern rule of Court. The 4 Ann. c. 16, s. 11, enacts "that *no dilatory plea* shall be received in any Court of record, unless the party offering such plea do by affidavit prove "the truth thereof, or show some probable matter to the Court "to induce them to believe that the fact of such dilatory plea "is true." The 9 G. 4, c. 14, s. 2, enacts in effect that in a joint action a plea in abatement as to one defendant shall not prevent recovery against the other. The 3 & 4 W. 4, c. 42, s. 8, enacts, that no plea in abatement for the *nonjoinder* of any person as a co-defendant shall be allowed in any Court of *law*, unless it be stated in such plea that such person is resident within the jurisdiction of the Court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea. And section 9 enacts that to any plea in abatement in any Court of law of the nonjoinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy or certificate, or under an act for the relief of insolvent debtors.

The 10th section contains a provision relating to a *fresh* action brought against all the persons named in a plea of nonjoinder in abatement, so as to prevent a total defeat on account of misjoinder in such fresh action. The 11th section enacts *that no plea in abatement for a misnomer* shall be allowed in any personal action, but directs that in any case where such a plea would heretofore have been available, there shall be a *summons*

(z) *Bond* v. *Smart*, 1 Chitty's Rep. 735; *Keeling* v. *Newton*, 1 Wils. 173.
(a) *Caswell* v. *Martin*, 2 Stra. 1072.
(b) *Robins* v. *Richards*, 1 Dowl. 578.
(c) 1 Arch. K. B. 229.
(d) See in general Tidd, 9th ed.; 2 Arch. K. B. 4th ed.; 1 Chitty on Pleading, 6th ed.

to compel the *plaintiff to amend his declaration at his costs,* by inserting the right name, founded on an *affidavit* thereof; and section 12 authorizes a plaintiff to use the same initials and contractions as have been used by a defendant in signing a bill or note or other written instrument.

The excellent effect of the 8th section is that a creditor may sue separately all the joint debtors in this country, without first outlawing those contracting parties who are abroad. The 11th section, it will be observed, only relates to the single instance of *misnomer,* so that it is still competent to a defendant to plead numerous other matters in abatement. In a late case, where the declaration described the plaintiff as Earl of Stirling, and the defendant pleaded in abatement that the plaintiff was not nor is Earl of Stirling, it was held that a replication that the plaintiff was and still is Earl of Stirling, concluding to the country, was bad on demurrer, for not showing *how* the plaintiff claimed that dignity, so as to *decide* the *mode* of trial. (*e*)

As each Court will take judicial notice who are attornies inrolled in their *own* Court, but not of the privilege of an attorney or other officer to be sued *in another* Court, it seems to be clear that a plea by an attorney or other officer of privilege to be sued in his own Court, cannot be pleaded to an action depending in another Court, without an *affidavit* of its truth; (*f*) and if such a plea be not supported by an affidavit, the plaintiff may sign judgment. (*f*)

Time of swearing *the affidavit* in support of a plea in abatement and of *pleading such plea.* (*g*)

It has for a long time been supposed that a defendant may, in the King's Bench, whether in a town or country cause, prepare and swear to the truth of his subsequent plea in abatement, before the declaration was delivered, on the ground that if this were not permitted, especially in a country cause, or where the defendant resided at a great distance from the metropolis, it would be impracticable to obtain the affidavit in time to accompany the plea, which must be pleaded within four days, both inclusive, after the declaration. (*h*) But in more recent decisions this doctrine has been denied, and it would seem that an affidavit sworn at any time before, still less if sworn nine or eleven days before the declaration has been delivered, would not now be received, and the plaintiff might sign judgment if it were used; (*i*) but Bayley, B. suggested "that perhaps the Court

(*e*) *Earl Stirling* v. *Clayton,* 3 Tyrw. 154.

(*f*) *Davidson* v. *Chilman,* 1 Bing. N. C. 297; *Davidson* v. *Watkins,* 3 Dowl. 129.

(*g*) See in general Chitty's Sum. Prac. 128 to 131.

(*h*) *Baskett* v. *Barnard,* 4 M. & Sel. 332; *Lang* v. *Comber,* 4 East, 348; 11 East, 348; 13 East, 170; 2 Chitty's R. 7; but see decisions in next note.

(*i*) *Westerdale* v. *Kemp,* 1 Tyr. 260; *Johnson* v. *Popplewell,* 2 Crom. & J. 544.

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" would give time for filing the affidavit of the truth, on the " special ground that the party lived at a great distance, and " that the declaration was filed so as to prevent the putting in " a plea of nonjoinder, which may be and often is an honest " plea."(k) And we have before seen that the Court or a judge will give time for pleading some pleas in abatement, such as nonjoinder or the pendency of a prior action for the same cause. (l) The affidavit of the truth of a plea in abatement must be, scrupulously correct in the title and in all other respects; (m) and where, inadvertently, the affidavit stated that the *affidavit* (instead of plea) hereunto annexed is true, and the defendant signed judgment of non pros for not replying to his plea in abatement, the Court, considering the plea a nullity on account of such defect, and which could not be waived, set aside the judgment of non pros. (n) The other parts of the practice relative to pleas in abatement and proceedings thereon, and the requisites of pleas in abatement, (o) will be found sufficiently considered in the works referred to in the note, and the most recent precedents will be found collected in a work exclusively on the subject of pleading.

The Reg. Gen. Hil. T. 4 W. 4, reg. 1, requiring *every pleading* to be intituled of the day of the month and year when the same is pleaded, and shall bear no other time or date, extends as well to pleas in abatement as those in bar, so that a plea to the jurisdiction, or strictly in abatement, should be intituled of the *very day* on which it is delivered, (p) thus avoiding the difficulties that formerly frequently occurred as well respecting pleas in abatement as of tender.

Reg. Gen. Hil. T. 4 W. 4, reg. 10, also seems to be imperative that after the title and names of the parties in the margin a plea in abatement as well as in bar *shall* commence thus:

C. D. ats A. B. } The said defendant by —— his attorney [*or* " in person"] says that, &c.

The form in the note of a plea in abatement and of the affidavit of its truth may assist in practice. (p)

(k) *Johnson* v. *Popplewell*, 2 Crom. & J. 546.

(l) *Ante*, 703; 1 Mann. & Ryl. 508, 510; Tidd's Sup.

(m) *Ante*, 538, &c. as to the requisites of affidavits in general.

(n) *Garratt* v. *Hooper*, 1 Dowl. 28.

(o) Tidd, 9th ed. 463, 634 to 643; 2 Arch. K. B. 4th ed. 543 to 549; and Chitty on Pleading, 6th ed.

(p) In the King's Bench [*or* " Common Pleas," *or* " Exchequer."]
The —— day of —— in the year of our Lord ——.

Plea in *abatement* that the contracts were made jointly with another

C. D. ats. A. B. } And the said C. D. by E. F. his attorney [*or* " in person"] prays judgment of the said writ and declaration, because he says that the said several promises in the said declaration mentioned, were and each of them was made

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Of pleas in *bar*.

To enable any person now to prepare pleas *in bar*, he must not only have a knowledge of *pleading*, but also of every branch of *law;* before the recent pleading rules most practitioners believed that in the actions of Assumpsit, Case, and Trover, the plea of "non-assumpsit" or "not guilty" *very generally* sufficed, and that under the same numerous special grounds of defence might be given in issue; but now the use of a plea of *general issue* is greatly limited, and in some cases, as in actions on a bill of exchange or promissory note, is entirely prohibited; and it has become necessary to state in the plea or pleas the exact ground of defence, though merely in the negative of a part of the declaration, as will be presently fully shown; the consequence is, that no prudent attorney, unless he have attained *very considerable knowledge* as well of law in general as of the present rules of pleading, will venture himself to *prepare* a plea or pleas; and great encouragement has been given to professed special pleaders more sedulously to study every part of their department. We shall here only take a very concise view of the *recent alterations* and *improvements, first,* as they affect the *form* and *general requisites* of a plea; 2ndly, as regards what matters *may* and *must* be pleaded specially; and, 3dly, when *several pleas* may be pleaded.

Forms and requisites of pleas in *bar* in *general*.

The recent statutes and rules have introduced some material alterations in the *forms* as well as *requisites* of pleas *in bar in general,* and still more as regards the use of *several pleas,* and which have a most extensive and beneficial influence upon the trial of the merits between the parties, and a general knowledge of which is essential to every practitioner, although he may not profess to prepare pleadings. Some of the rules relate merely to *form*, and were promulgated principally in order to save

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person not joined as co-defendant.

jointly with one G. H., who is still living and residing at ——, within the jurisdiction of this Court, and not by the said C. D. alone, and this he the said C. D. is ready to verify; wherefore inasmuch as the said G. H. is not named in the said writ or declaration together with the said C. D., he the said C. D. prays judgment of the said writ and declaration, and that the same may be quashed, &c. [*See other forms, Chitty on Pleadings, 6th ed.*; *add affidavit as follows.*]

[*Counsel's Signature.*]

Affidavit of the truth of such plea and of the residence of the party named therein.

In the King's Bench [*or* " Common Pleas," *or* " Exchequer."]

Between { A. B. Plaintiff, and C. D. Defendant.

C. D. of ——, tailor, the defendant in this cause, maketh oath and saith that the plea hereunto annexed is true in substance and fact, and that the said G. H., named in the said plea, is now residing [*or* " the place of residence of the said G. H., &c. is now at this time"] at No. 10, in —— Street, in the parish of —— in the county of —— and within the jurisdiction of this Court.

Sworn, &c. C. D.

prolixity and consequent expense, and to preserve similarity in practice; but others, still more important, were introduced to *prevent surprise* on the opponent on the trial, and to secure a trial upon simple and distinct issues, in lieu of proceeding to trial on a mere general issue. The object of the rules will appear from the recital to the 5th rule of Reg. Gen. Hil. T. 4 W. 4, expressed in these terms: "And whereas by the *mode* "*of pleading* hereinbefore prescribed *the several disputed facts* "*material to the merits of the case will, before the trial, be* "*brought to the notice of the respective parties more distinctly* "*than heretofore*;" then prescribes the rules having that object, and some of which have been stated and their application to pleas in part examined in the chapter relating to declarations. (q)

Pleas in bar are to be considered with reference to their *forms* and their *requisites*. With respect to *form*, as regards,

1st, The title or date;

2dly, Marginal description of the parties to the cause;

3dly, The commencement;

4thly, The body;

5thly, The conclusion;

6thly, The variations when there are several pleas; and,

7thly, The signature of counsel. (r) The forms in the notes will illustrate.

(q) *Ante*, 482, 483.

(r) In the King's Bench.

Form of plea of non-assumpsit or other plea denying the whole or part of a declaration, and concluding to country.

On the —— day of ——, A. D. 1835.

C. D. ats. A. B. } The said defendant by Y. Z. his attorney [*or* "in person," *or* "by E. F. admitted by the Court here as guardian of the defendant to defend for him, who is an infant under the age of twenty-one years,"] says that "*he did not promise*," [*or if action against a party to a bill of exchange, say* "he did not accept, or "draw" or "indorse"] the said bill of exchange [*or deny any other part of the declaration, and then conclude to the country thus*:] in manner and form as the plaintiff hath complained against him. And of this the defendant puts himself on the country, &c.

Form of plea to a part of the cause of action, and another plea to other part or residue.

C. D. ats. A. B. } The said defendant by Y. Z. his attorney [*or* "in person,"] as to so much of the first count of the declaration as relates to the beating and illtreating the said A. B. says that the plaintiff ought not to have or maintain his action thereof against the defendant, because he saith that, &c. [*State the answer whether it consist of denial or of new matter, concluding the former to the country and the latter with a verification, and then state the plea or pleas to the other parts of the declaration thus*:] And the defendant as to the residue of the said first count [*or* "as to the residue of the declaration,"] saith that the said plaintiff ought not to have or maintain his action thereof against the defendant, because he says that [*stating the answer to such part of the declaration thus pleaded to—see a form which was considered defective and open to a special demurrer*, Vere *v.* Goldborough, 1 Bing. N. C. 353.]

Commencement of a second plea to same matter.

And for a *further* plea in this behalf the defendant saith that, &c. [*Then state the subject-matter of the second or subsequent plea the same as in a first plea. The Reg. Gen. Hil. T. 4 W. 4, orders that it shall not be necessary to state in a second or other plea or avowry that it is pleaded by leave of the Court or according to the form of the statute, or to that effect, although it may be still necessary to obtain a rule.*]

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1st. The title or *date* at top.

1. *The title or date at top.*—Reg. Gen. Hil. T. 4 W. 4, reg. 1, orders that "*Every pleading*, as well as the declaration, shall be intituled of the day of the month and year when the same is pleaded, and shall bear no other time or date, unless otherwise specially ordered by the Court or a judge."(*s*) But if that title be omitted or misstated, it is not ground even of special demurrer; and the Court ordered such a demurrer to be set aside with costs. (*t*) This accords with the decisions on the want of technical accuracy in the *commencement* of a *declaration*, which we have seen is not ground of demurrer, but is at most only an irregularity, to be taken advantage of by summons or motion, or rather, in the first instance, by application to the defendant's attorney to correct the untechnical part of his plea. (*u*)

2nd. *Marginal title of cause.*

There is not any express regulation respecting the description of the parties in the margin of the plea, nor is any particularity essential, and if there were no margin, probably it would be considered that the plea was delivered in the pending action, when there was only one between the same parties. It has been suggested, that when the plea is by one of several defendants, the margin of the plea of a defendant pleading separately should be "*B. sued with C. and others,*" and the defendant pleading should be described throughout the plea by name as the said defendant B. (*v*)

3rd. *Introduction or commencement of* plea.

With respect to the introduction or *commencement* of the plea the Reg. Gen. Hil. T. 4 W. 4, reg. 9, orders that "In a *plea* or subsequent pleading intended to be pleaded *in bar of the whole action generally*, it shall not be *necessary* to use any allegation of *actionem non*, or to the like effect, or *any prayer of judgment;* nor shall it be *necessary* in any *replication* or subsequent pleading intended to be pleaded in maintenance of the *whole action* to use any allegation of '*precludi non*,' or to the like effect, or any *prayer of judgment;* and all pleas, replications, and subsequent pleadings pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in maintenance of the *whole action*, provided that nothing herein contained shall extend to cases where an estoppel is pleaded."

Reg. 10 orders that "*No formal defence* shall be required in a plea; and it *shall commence as follows:* 'The *said de-*

(*s*) Jervis's Rules, 98.

(*t*) *Neal* v. *Richardson*, 2 Dowl. 89.

(*u*) *Ante*, 466, as to declarations.

(*v*) Petersdorff's Precedents, 18.

" '*fendant by —— his attorney* [*or* ' in person,' &c.] *says that*.' " Which rule gets rid of the technicalities respecting full and half defence.

Reg. 11 orders that " It shall not be necessary to state in a " second or other plea or avowry, that it is pleaded *by leave of* " *the Court*, or according to the *form of the statute*, or to that " effect."

Reg. 12 orders that " *No protestation* shall hereafter be " made in any pleading; but either party shall be entitled to " the same advantage in that or other actions as if a protesta- " tion had been made."

Reg. 13 orders that " All *special traverses* or traverses with " an inducement of affirmative matter, shall conclude to the " country;" but provides " that this regulation shall not pre- " clude the opposite party from pleading over to the induce- " ment when the traverse is immaterial."

On referring to the form subscribed in the 10th rule, and given in the note, (*x*) such rule directs that every plea *shall commence* " *The said defendant by* —— *his attorney* [*or* " in " person,"] *says that*. And this rule puts an end to the distinctions between whole and half defence. (*y*) It seems that if the name of a person not authorized to act as an attorney in the Court where a plea is pleaded, be inserted, still the plea cannot on that account be treated as a nullity. (*z*) It is clear that a defendant, even at the suit of the crown, may plead and defend in person. (*a*)

It has been decided that the words *actionem non*, in the above ninth rule, is not essential in a plea pleaded separately to an *entire count*; the expression " *the whole action generally*," in that rule meaning only the whole case stated in the declaration, *or* the whole case contained in the *count* to which the plea is pleaded. (*b*) And it has been observed that as the terms of the rule are that it shall not be *necessary* to commence with an actionem non, if the old form were unnecessarily continued, it would be no ground of demurrer or an irregularity. (*c*) A commencement of a plea thus " comes, &c." " And the defendant by his attorney says that, &c." was always sufficient, and the word *comes* was never considered part of the

(*x*) *Ante*, 715.
(*y*) Bosanquet's Rules, 37, note (32).
(*z*) *Hill* v. *Mills*, 2 Dowl. 696.
(*a*) *Attorney-General* v. *Carpenter*, 1 Tyr. Rep. 351.
(*b*) *Per* Lord Denman, C. J. in *Bird* v. *Higginson*, 4 Nev. & Man. 505; 1 Har. & Wol. 61, S. C.; and see observations on the rule in *Vere* v. *Goldsborough*, 1 Bing. N. C. 353, *post*; and Bosanquet's Rules, 36, note 39.
(*c*) Bosanquet's Rules, 35, note 30.

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plea, but merely *an entry* of the defendant's *appearing in person*, or by attorney.(*d*) The introductory part of the plea, when it is not intended to plead to the whole declaration, qualifies and shows to what part of the complaint the defendant is about to plead his answer; and in trespass and other actions this will frequently save the necessity for a new assignment. And Bayley, B. observed, "It is a clear rule in pleading, that a plea cannot be considered as justifying more than it *professes* to justify, and that you are to look to the *introductory part* of it to see what the plea professes to justify."(*e*) When the defendant pleads several pleas separately to several counts, as he may do without a rule to plead double, the commencement of each plea should properly state to which count or part of a count it is about to be pleaded. But if untechnically the pleas to a declaration on a bill of exchange and on an account stated run thus: "And the defendant, by J. S. his attorney, saith that he did not accept the said bill of exchange in the said declaration mentioned. And for a further plea saith that he did not account with the plaintiff as in the declaration is alleged:" it was held that the informality of omitting to confine each plea to the count to which it applied did not authorize the plaintiff to sign judgment; and the Court said the objection, if at all, should have been taken by special demurrer.(*f*)

Body of a plea in bar, and general *requisites*.

We have seen that *venue*, or place, is not to be repeated in any part of pleading after it has been once stated in the margin of the declaration, unless where local description may be essential, as in describing abuttals and in averring performance; which sometimes must be shown to have been in a particular place.(*g*) A plea must not attempt to put in issue what is not disputed in the declaration, and if it do, the plaintiff may demur;(*h*) and a plea, averring that the defendant performed more than the plaintiff's declaration stated he had not performed, is bad.(*h*) On the other hand, if a plea profess in its commencement to be an answer to the whole of a count, but leaves unanswered any good part, the plaintiff will have judgment on demurrer; (*i*) and as well before as since the new rules of pleading the plea must either traverse or confess and avoid, and not both;(*k*) and therefore a plea, that the defendant was

(*d*) Wordsworth's Rules, 42, note (*a*).

(*e*) *Neville* v. *Cooper*, 2 Crom. & M. 331; and see *Crump* v. *Adney*, 3 Tyrw. 270.

(*f*) *Vere* v. *Goldsborough*, 1 Bing. N. C. 353.

(*g*) Reg. Gen. Hil. T. 4 W. 4, reg. 8.

(*h*) *Bishton* v. *Evans*, 3 Dowl. 735; and 1 Gale, 76, S. C.

(*i*) *Crump* v. *Adney*, 3 Tyr. 279.

(*k*) *Gould* v. *Lasbury*, 1 Crom. M. & Ros. 254.

discharged by the order of the Insolvent Debtors Court from the causes of action in the declaration mentioned, *if any*, however usual in this and other pleas, is bad on special demurrer. If illegality or legal defect in the plaintiff's right of action be pleaded, the exact objection must be accurately and legally pleaded; and therefore to a declaration on a bail bond it should be pleaded that no affidavit of the plaintiff's cause of action was *made;* and if the plea be merely that no affidavit was *filed* the plaintiff may demur. (*l*) But although founded on a statute a plea need not, like a declaration thereon for a penalty, conclude *contra formam statuti,* (*m*) as a plea that the contract was made on a Sunday. (*m*)

There is a particular regulation relative to the requisites of a plea of *judgment recovered,* but which we will consider when observing upon *sham pleas.* (*n*)

Conclusions of pleas in bar.

As regards the *conclusion* of a plea the recent statutes and rules are silent; excepting that Reg. Gen. Hil. T. 4 W. 4, reg. 13, orders "that all special traverse or traverses with an "inducement of affirmative matter shall *conclude* to the coun-"try;" but provides that that regulation shall not preclude the opposite party from pleading over to the inducement when the traverse is immaterial; a subject more properly to be considered fully in a distinct work on pleading. (*o*) This rule has properly put an end to the continuance of the absurd practice of concluding a special traverse of any matter, as of a right of way or of common, with a *verification,* instead of to the country; and notwithstanding there were already complete affirmative and negative allegations, constituting a perfect issue, and which, as observed by Mr. Serjeant Williams, rendered it wholly unnecessary to conclude with a verification, occasioning a useless repetition of the right in the rejoinder. (*p*) In all other respects the *conclusion* of a plea is governed by the pre-existing rules. And if a plea in bar have no conclusion either to the country or with a verification, the plaintiff may demur specially; (*q*) and therefore a plea to a declaration on a bail bond, that no affidavit of the cause of action had been made, but having no conclusion, was held demurrable on that as well as on other

(*l*) *Knowles* v. *Stevens,* 1 Crom. M. & Ros.; 2 Dowl. 666.

(*m*) *Peate* v. *Dicken,* 1 Crom. M. & Ros. 422.

(*n*) Reg. Gen. Hil. T. 4 W. 4, reg. 8; Jervis's Rules, 89, note 9; and *post,* 730.

(*o*) See Chitty on Pleading, 6th ed.

(*p*) 1 Saunder's Rep. 103 b, 103 c.

(*q*) *Snow* v. *Stevens,* 2 Dowl. 664, in 1 Crom. M. & Ros. 26, called *Knowes* v. *Stevens;* and see *Bird* v. *Higginson,* 1 Harr. & Wol. 61; 4 Nev. & Man. 505, S. C.

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grounds.(r) But Reg. Gen. Hil. T. 4 W. 4, r. 9, clearly provides that no prayer of judgment shall be essential to a plea in bar;(s) indeed that prayer never seems to have been necessary, at least in a plea in bar; because the Court will as of course, without any prayer, give the correct judgment.(t) It will be observed, however, that the prescribed form of a plea of payment of money into Court, (but which it will be observed is pleaded only to *part* of the action,) concludes with this prayer, " wherefore he prays judgment if the plaintiff ought *further* to " maintain his action."(u)

The conclusion of a plea, merely *denying* the whole or part of the facts stated in the declaration, or one count, concludes to the *country* thus: " *And of this the defendant puts himself* " *upon the country.*" It has been usual at the end to add " &c."; but which as regards the defendant had better be omitted, as it may assist a plaintiff where he has neglected to add the similiter, (being " and the plaintiff doth the like,") and will supply the omission, and enable him to retain a verdict in his favour.(x) The conclusion with a *verification* varies in two respects. When new matter *of fact*, the existence of which is to be properly tried by a jury if denied, is pleaded, then the conclusion is, " *And this the defendant is ready to verify.*" But if the new matter pleaded be of record, then the conclusion is, " *And this the defendant is ready to verify by the record.*"

Signature of pleas.(y)

By express rule 18 Car. 2, it was ordered " that no *special* " *pleas or demurrers* in law in any cause here in Court shall " be received by the clerk of the papers before such pleas or " demurrers shall be signed with the *proper hand* of some " counsel in that behalf retained;" the object of which rule was that no special pleas should be introduced on the files of the Court without being sanctioned with the *actual approbation* of counsel, testified by his signature.(z) It is desirable that such signature should not as at present be treated as a mere matter of form, and that it should be imperative on counsel, instead of receiving a fee for his signature as of course, actually to certify or be considered as certifying *that he had in fact examined the plea with the facts*, and approved of such

(r) *Id. ibid.*
(s) *Ante*, 716.
(t) *Bird* v. *Higginson*, 1 Harr. & Wol. 61; 4 Nev. & M. 505, S. C.
(u) Reg. Gen. Hil. T. 4 W. 4, reg. 17.
(x) *Clarke* v. *Nicholson*, 6 Car. & P. 712; 1 Gale, 21; 3 Dowl. 454; 1 Chitty on Pl. 5th ed. 631, *6th edit. more fully.*
(y) See in general Tidd, 9th ed. 672; Archbold, K. B. 4th ed.; Arch. C. P.; Chitty on Pleading, 6th ed. for lists of the pleas which must or need not be signed by counsel.
(z) Per Bayley, J., *De Normanville* v. *Meyer*, 1 Chitty's Rep. 211.

plea with reference to the latter. It was formerly also requisite in the *other* Courts at Westminster that all *special* pleas should be signed by a *serjeant or counsel*, and thus to denote that in his judgment it was a proper plea, (*a*) and this even in a case where a defendant of right in other respects defended in person; (*b*) and in the Common Pleas it was considered that if a plea had been signed by a serjeant, it was necessary also that the pleading in answer, whether replication or joinder in demurrer, should be so signed; (*c*) and in the Exchequer it seems that *all* pleadings where the Crown is concerned must be signed by the attorney-general or may be treated as a nullity; (*d*) and in all the Courts, if a plea, requiring signature, be delivered unsigned, the plaintiff's attorney may, after waiting till the full time for pleading has expired, though not before, sign judgment as for want of a plea. (*e*)

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The recent statutes and notes have introduced some important changes as regards the signature of pleadings, viz.—*first*, that as the Common Pleas is now an open Court, *any* counsel as well as a serjeant may sign any pleadings therein. (*f*) *Secondly*, Reg. Gen. Hil. T. 2 W. 4, reg. 107, orders that "it "shall not be necessary that any pleadings which *conclude to* "*the country be signed* by counsel;" (*g*) and Reg. Gen. Hil. T. 4 W. 4, reg. 4, directs that "to a *joinder in demurrer* no "signature of a serjeant or other counsel shall be necessary, "nor any fee allowed in respect thereof." (*h*)

When counsel's signature is required, it must, by the terms of the rule, be in his own handwriting, though in practice his clerk frequently signs. His own signature should also distinctly appear at the foot of the plea and not by indorsement, for it is the counsel's signature at the bottom of the plea, like the signature at the foot of a will, that best denotes his approbation of the whole. (*i*)

Delivery of plea.

The rule of Mich. Term, 1 W. 4, reg. 7, in the Exchequer, and now the General Practice Rules of Hil. Term, 4 W. 4,

(*a*) See in general Tidd, 9th ed. 672; Archbold, K. B. 4th ed.; Arch. C. P.; Chitty on Pleading, 6th ed. for lists of the pleas, which must or need not be signed by counsel.

(*b*) *Samuels* v. *Dunne*, 3 Taunt. 386; *De Normanville* v. *Meyer*, 1 Chitty's R. 209.

(*c*) *Brooker* v. *Sampson*, 2 Bos. & Pul. 336; *Simson* v. *Neal*, 2 Wils. 741; *Ellis* v. *Gower*, 1 Bos. & Pul. 469; *Pitcher* v. *Martin*, 3 Bos. & Pul. 171; Tidd, 693.

(*d*) *R.* v. *Wollett*, 3 Dowl. 694.

(*e*) *Pepperell* v. *Burrell*, 4 Tyr. 812; 1 Cromp. M. & Ros. 372; 2 Dowl. 321, S. C.; *Macher* v. *Billing*, 4 Tyr. 812; 3 Dowl. 246, S. C.; *Hockley* v. *Sutton*, 2 Dowl. 700; *ante*, 710.

(*f*) *Power* v. *Fry* or *Isod*, 1 Bing. N. C. 304; 3 Dowl. 149.

(*g*) Jervis's Rules, 71, note (*e*); Tidd, 672, 673, 693.

(*h*) Jervis's Rules, 87, note (*b*). It may be questionable whether these rules are well founded: A similiter or joinder in demurrer may undoubtedly be readily framed, but it may require much knowledge to decide on their adoption.

(*i*) *Grant* v. ——, 2 Chitty's R. 319.

reg. 1, direct that no demurrer nor *any pleading* subsequent to the declaration shall *in any case be filed* with any officer of the Court, but the same shall *always be delivered* between the parties, (*k*) which saves time and takes away the necessity for a search at any office before signing judgment. But the latter rule only extends to personal actions, and not to ejectment. (*l*) It was held that if a defendant file two pleas at several times on the same day, in order to mislead the plaintiff by the second plea, the plaintiff might sign judgment; (*m*) but probably now that Reg. Gen. Hil. Term, 2 W. 4, r. 46, precludes a defendant from changing his plea, without express leave of the Court or a judge, it would be held that the plea first delivered is that to be acted upon, and the second only a nullity. The plea must be delivered at length in its full perfect state; and where the defendant's attorney delivered a writing on a stamped paper, thus, "*The general issue*," which was objected to, and the plaintiff signed judgment by default, the Court refused to set such judgment aside without an affidavit of merits. (*n*)

Of *waiving* or *adding* a plea when.

Although the Reg. Gen. Hil. T. 2 W. 4, reg. 46, orders "that the defendant shall not waive his plea, without leave of the Court or a judge;" yet when justice requires, a plea may be withdrawn, and another substituted or added, and even after issue joined a plea may be added, as even a plea of a foreign statute of limitations. (*o*) That regulation, assimilating the practice of the King's Bench to that in the Common Pleas and Exchequer, put an end to the vexatious practice of pleading a sham plea and afterwards abandoning it at any time before the expiration of a rule to abide by the plea, which is no longer necessary. (*p*) Where a defendant obtained judgment on demurrer to his special justification covering the *whole* declaration, the *Court* permitted him to *withdraw* the general issue, but said that the application should have been at *chambers*. (*q*) But recently leave to add a plea of justification on the eve of the trial was refused; and after verdict for plaintiff on a plea of not guilty, the Court refused permission to add a plea of justification, and grant a new trial, on the ground of a mistake of the pleader. (*r*)

Of pleading, &c.

Although a defendant *may* plead de novo to a declaration,

(*k*) Jervis's Rules, 8, 87, note (*a*), where see prior decisions showing the former perplexing variations in practice.

(*l*) Doe d. *Williams* v. *Williams*, 4 Nev. & Man. 259.

(*m*) *Bulmer* v. *Dukin*, 8 Taunt. 386.

(*n*) *Gibson* v. *Houseman*, 1 Chitty's Rep. 647, note (*a*).

(*o*) *Huber* v. *Steiner*, 2 Dowl. 781; 4 M. & Scott, 329.

(*p*) Jervis's Rules, 54, note (*v*); Tidd, 673, 674; Dax's Prac. 103, Chitty's Summary Prac. 136, 137.

(*q*) *Young* v. *Beck*, 3 Dowl. 804.

(*r*) *Kirby* v. *Simpson*, 3 Dowl. 791.

after it has been amended, this is a mere *liberty*, of which he need not avail himself, unless his former plea would be improper or insufficient to the new declaration. (q)

Of pleading de novo to an amended declaration.

VI *Of what plea may or must be pleaded.*

What facts must be traversed or pleaded particularly, and when a special plea is necessary.

The principal object of the recent Pleading Rules, promulgated under the authority of 3 & 4 W. 4, c. 42, s. 1, is *to diminish the use of a general issue*, and to compel a defendant to state in his plea the *particular point* on which he rests his defence, instead of taking the plaintiff by surprise at the trial, by then, perhaps for the first time, advancing an unexpected ground of defence, and by this means also the judge and jury on the trial must have presented to their consideration a more distinct and less complex issue. The 1st section of that act, however, provides that no rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence in any cause wherein he was then or thereafter should be entitled to do so by any act of parliament; so that under the statute 21 Jac. 1, c. 12, s. 5, and very numerous other acts, justices of the peace, and almost every description of public officer, (r) *may still* plead the general issue and give most grounds of defence in evidence under it; that, however, is a mere liberty, of which it will frequently be advisable for a defendant not to avail himself, as attempted to be shown in another work. (s) And when a statute gives the general issue, the Court will not allow in addition to that plea a special plea. (t)

Cannot traverse the allegation in *commencement* of declaration of the *writ* by which defendant sued.

It seems to be a general rule that the defendant must plead to the substance or body of the declaration, and not to the commencement, and therefore a plea that the defendant was not detained in custody, as alleged in the commencement of the declaration, was considered to be frivolous and vexatious. (u)

Denial of character or right in which plaintiff sues or defendant is sued, must be pleaded specially.

The 21st rule of Reg. Gen. Hil. T. 4 W. 4, is an excellent *general* rule, extending to *all* actions and to all parts or stages of pleading, as well plea, replication and rejoinder, &c. It orders that " in all actions by and against assignees of a bankrupt or " insolvent, or executors or administrators, or persons authorized " by statute to sue or be sued as nominal parties, *the character* " in which the plaintiff or defendant is stated on the record to " sue or be sued, shall not in any case be considered as in issue, " *unless specially denied*." So that in an action by the assignees

(q) *Fagg* v. *Boosley*, 2 Dowl. 107.

(r) The Lord Chancellor and others, see *Dicas* v. *Lord Brougham*, 6 Car. & P. 249

(s) See Chitty on Pleading, 6th ed. vol. i.; and see *Wisdom* v. *Hodson*, 3 Tyr. 817, note (a).

(t) *Neale* v. *M'Kenzie*, 1 Cr. M. & R. 61; 2 Dowl. 702.

(u) *Rex* v. *Kingston*, *ante*, vol. iii. 394, 3 Dowl. 159.

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of a bankrupt, (u) unless there be an express plea denying that they are assignees, they need not adduce any proof of that character; so unless there be a plea that the plaintiff is not executor, or not administrator, neither the probate nor the letters of administration need be proved or produced. (x) Indeed the issue joined on the pleadings will in general direct and limit the evidence to be adduced. (y) It has, however, been doubted whether, when a private company sues by their officer, though the defendant has not traversed the plaintiff's alleged character, yet it may be incumbent upon him at the trial to produce and prove the statute, which authorizes the company to sue in that officer's name, unless the act were declared public. (z) It should seem, however, on general principles and under the other rules about to be noticed, that every allegation in a declaration or plea which is not traversed, is impliedly admitted.

The Reg. Gen. Hil. T. 4 W. 4, in the next place prescribes the following rules of pleading applicable to each form of action. These rules have already given rise to very numerous decisions and some questionable points, and which will be found collected with the appropriate precedents in a distinct work on the subject of pleading. (a) We shall here only state the rules themselves, with a few of the decisions thereon.

I. *Assumpsit.*

1. Plea of *non-assumpsit* to put in issue only *express* contract or the facts from which contract *implied*

I. In all actions of *assumpsit*, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial in fact of the *express contract* or *promise* alleged, (b) or of the *matters of fact* from which the contract or promise alleged may be *implied* by law.

Ex. gr. In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged *consideration*, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

(u) *Inglis* v. *Spence*, 1 Crom. M. & R. 432; *Jones* v. *Brown*, 1 Bing. N. C. 484.

(x) Per Alderson, B. in *D'Aranda* v. *Houston*, 6 Car. & P. 512.

(y) And see *Dukes* v. *Gosling*, 3 Dowl. 619; and *Barnett* v. *Glossop*, 1 Bing. N. C. 633; 1 Hodges, 94; 3 Dowl. 625, S.C.

(z) Bosanquet's Rules, 45, note 44.

(a) See fully Chitty on Pleading, 6 ed.

(b) Non assumpsit puts in issue the fact of the defendant having signed or authorized the signing of his name to a written instrument, and in effect the sufficiency of the *stamp*, because 23 G. 3, c. 58, s. 12, as to agreements, declares an unstamped instrument unavailable, and also prohibits the reading it in evidence. The want of a proper stamp is however sometimes pleaded, Bosanquet's Rules, 105. And see some valuable notes on those rules, Bosanquet's Rules, 46 to 63, and Chitty on Pleading, 6th edit. In the latter will be found every description of plea that can be required under these rules.

In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

In actions against carrier or bailee, not of breach.

In an action of *indebitatus assumpsit* for goods sold and delivered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in *point of fact*; (*b*) in the like action for money had and received, it will operate as a denial both of the receipt of the money, and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

In *indebitatus* for goods sold or money received, *non assumpsit* to put in issue only sale and delivery, and receipt of money to use of plaintiff.

2. In all actions upon bills of exchange and promissory notes, the plea of *non assumpsit* shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact, *e. g.*, the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

2. *Non assumpsit* inadmissible in action on bill or note, but defendant must traverse, in particular, the drawing, making, indorsing, accepting, presenting, or notice of dishonour.

3. In *every species of assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, (*c*) on the ground of fraud *or otherwise*, shall be specially pleaded. (*d*) *Ex. gr.* Infancy, coverture, release, payment, (*e*) performance, illegality of *consideration*, either by statute or common law, (*f*) drawing, indorsing, accepting, &c.,

3. Matters in confession and avoidance, and in discharge, and defences in law, to be pleaded particularly, as infancy, coverture, release, payment, performance, illegality of consideration, &c.

(*b*) In *Edmunds* v. *Harris*, 4 Nev. & Man. 182, 6 Car. & P. 547, it was held that to indebitatus assumpsit for goods sold or work done, defendant must plead specially that the *credit* had not elapsed; but in *Taylor* v. *Hillary*, 1 Gale, 23; 3 Dowl. 461, S. C.; *Knapp* v. *Harden*, 1 Gale, 47; 6 Car. & P. 745, S. C.; and in *Gardner* v. *Alexander*, 3 Dowl. 146, the propriety of that decision was doubted. So it has been supposed, that to assumpsit for goods sold or work done, defendant must plead specially that the goods were of bad quality, or that the work was improper, so as to reduce the claim, *Cooper* v. *Whitehome*, 6 Car. & P. 545; *Roffey* v. *Smith*, 6 Car. & P. 662; but as the allegation in the declaration *indebitatus assumpsit* affirms that there is a debt for goods sold or work done, whatever shows that there was no such debt, as that the goods or work were insufficient, or the credit not expired, directly negatives such allegation, and should therefore be admissible without a special plea. However, the safest course will be to plead specially, as in *Knapp* v. *Harden*, 1 Gale, 47; 6 Car. & P. 745, S. C.

(*c*) The bill not duly stamped, Bosanquet's Rules, 105; bill altered in a material respect, 4 Nev. & Man. 409; void in law, *Barnett* v. *Glossop*, 1 Bing. N. C. 33; 1 Hodges, 94; 3 Dowl. 625, S. C.; want of an assignment in writing of a copyright, must be pleaded, and non-compliance with the requisites of statute against frauds, *Hawes* v. *Armstrong*, 1 Bing. N.C. 763; *Cleney* v. *Piggott*, 1 Harr. & Woll. 20.

(*d*) Puffing at auction, *Icely* v. *Grew*, 6 Car. & P. 671.

(*e*) *Payment* must be pleaded, *Linley* v. *Polden*, 3 Dowl. 780.

(*f*) *Polls* v. *Sparrow*, 1 Bing. N. C. 594; 3 Dowl. 630; *illegality*, quære distinction taken in Bosanquet's Rules, 51, note (49).

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bills or notes by way of accommodation; (*f*) set-off, (*g*) mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences *must* be pleaded.

4. In declaration on policy the interest may be averred to have been in several, and proof of either shall suffice.

4. In actions on policies of assurance, the interest of the assured may be averred thus:—"That A., B., C., and D., or some or one of them, were or was interested, &c.;" and it may also be averred, "That the insurance was made for the use and benefit, and on the account of the person or persons so interested."

II. *In Covenant and Debt.*

1. *Non est factum* to be considered as merely denying the execution of the deed, and all other defences must be specially stated.

1. In debt on specialty or covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only; and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

2. *Nil debet* abolished.

2. The plea of "*nil debet*" shall not be allowed in any action.

3. Plea of "never indebted," to be admissible to the like extent as non *assumpsit*, but matters in avoidance to be specially pleaded.

3. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that "*he never was indebted in manner and form as in the declaration alleged;*" and such plea shall have the same operation as the plea of *non assumpsit* in *indebitatus assumpsit*, and

(*f*) A plea of *no consideration generally* for accepting or indorsing, without stating affirmatively *how* there was no consideration, and showing the facts why the defendant ought not to pay, and knowledge of them on the part of the plaintiff, is bad, first, because it amounts to the general issue, the law *implying* a consideration for an acceptance and indorsement, but principally because it does not confess and avoid, or state, as intended by the new rules, with particularity, the facts, which probably are more within the knowledge of the defendant than the plaintiff. The plaintiff may therefore demur to such a general plea, as in *Low* v. *Chifney*, 1 Bing. N. C. 267; *French* v. *Archer*, 3 Dowl. 130; *Stoughton* v. *Earl Kilmorey*, 1 Gale, 91; 3 Dowl. 705, S. C.; *Easton* v. *Pratchet*, 6 Car. & P. 736; 1 Gale, 30; 3 Dowl. 472, S. C.; *Mills* v. *Oddy*, 3 Dowl. 730; 1 Gale, 92; 3 Car. & P. 728, S.C.; *Pearce* v. *Champneys*, 3 Dowl. 276; *Stein* v. *Yglesias*, 3 Dowl. 252; *Reynolds* v. *Joemry*, 3 Dowl. 453. And after demurrer to such a plea, *leave to amend has been refused*, without an affidavit of merits, *id. ibid.* and *Stoughton* v. *Kilmorey*, 3 Dowl. 706; 1 Gale, 91, S. P. But as an issue on a *general* plea of no consideration found for or against the defendant will be good after verdict, the plaintiff may safely take issue, either *generally* that there was a sufficient consideration, *Mills* v. *Oddy*, 6 Car. & P. 728; 3 Dowl. 730; 1 Gale, 92, S. C.; *Easton* v. *Pratchett*, 6 Car. & P. 736; 1 Gale, 30; 3 Dowl. 472; 1 Mood. & Rob. 379; (and *defendant's* counsel is to begin at the trial, *Mills* v. *Oddy*, 6 Car. & P. 728; *Homan* v. *Thompson*, *id.* 717, S. P.); or the plaintiff may reply *more specially*, setting out a consideration under a videlicet, and yet concluding to the country, *Low* v. *Burrows*, 4 Nev. & Man. 366; 1 Harr. & Wol. 12.

How to plead specially, and forms of sufficient pleas, or pleas that may be readily made sufficient, see *Stein* v. *Yglesius*, 1 Gale, 98; *Percival* v. *Framplin*, 3 Dowl. 748; *Heydon* v. *Thompson*, 1 Adol. & El. 210; Bosanquet's Rules, 104; *Byess* v. *Wylie*, 3 Dowl. 525; 1 Gale, 50; 1 Cromp. M. & Ros. 686, S. C.; *Bramah* v. *Baker*, 1 Hodges, 66; 1 Bing. N. C. 169; 3 Dowl. 392, S. C.

(*g*) *Set off* must *now* be *pleaded*, Bosanquet's Rules, 52, note 50; and see *Duncan* v. *Grant*, 1 Crom. M. & Ros. 283; 2 Dowl. 683; 4 Tyr. 818, S. C.

all matters in confession and avoidance shall be pleaded specially, as above directed in actions of *assumpsit*.

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4. In other actions of debt the plea to traverse a particular fact, and to state matter in avoidance.

4. In other actions of debt, in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.

III. *Detinue.*

Non detinet only to put in issue the fact of detention of the specified goods, and not plaintiff's property therein, or other ground of defence.

The plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defence than such denial shall be admissible under that plea.

IV. *In Case.*

1. Not guilty in *case*, only to put in issue the alleged wrongful act or omission, and not facts stated as inducement.

Instances in elucidation of this rule.

1. In actions on the case, the plea of *not guilty* shall operate as a denial only of the breach of duty or *wrongful act* alleged to have been committed by the defendant, and not of the facts stated in the *inducement;* (*h*) and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. *Ex. gr.* In an action on the case, for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods. (*i*) In an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or

(*h*) *Dukes* v. *Gostling*, 1 Bing. N. C. 588; 3 Dowl. 619, S. C. Not guilty does not put in issue the *inducement* as to plaintiff's right, though in some degree part of description of the injury, *Frankum* v. *Earl Falmouth*. 1 Harr. & Wol. 1; 4 Nev. & Man. 330; 6 Car. & P. 529, S. P.

(*i*) See pleas of property in defendant in trespass, *Wilton* v. *Edwards*, 6 Car. & P. 677; plea that sale to plaintiff was fraudulent, 1 Mood. & R. 400; transfer for value and replication, 1 Hodges, 98; 1 Bing. N. C. 681; seizure under a *fi. fa.* and replication, 1 Bing. N. C. 721; seizure under four warrants, 1 Adol. & El. 264; tenancy in common, or partnership, must be pleaded, *Stancliffe* v. *Hardwick*, 3 Dowl. 762.

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trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged. In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings. In this form of action against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant, as a carrier for hire, or of the purpose for which they were received.

2. All matters in confession and avoidance to be pleaded specially.

2. All matters in confession and avoidance shall be pleaded specially, as in actions of *assumpsit*. (*k*)

V. *In Trespass.*

1. A declaration in trespass to land, &c. must state the name or abuttals, &c., or the defendant may demur.

1. In actions of trespass *quare clausum fregit*, the close or place in which, &c., must be designated in the declaration by *name* or *abuttals*, or *other description*, in failure whereof the defendant may demur specially.

2. Not guilty to be a denial of the defendant's trespasses, but not of plaintiff's possession or right of possession, and which must be specially traversed.

2. In actions of trespass *quare clausum fregit*, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged (*l*) in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially.

3. Not guilty, to trespass *de bonis asportatis*, to be considered only a denial of taking, or merely damaging the goods, and not of plaintiff's property.

3. In actions of trespass *de bonis asportatis*, the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged (*l*) by taking or damaging the goods mentioned, (*l*) but not of the plaintiff's property therein.

4. Plea of right of way with carriages, cattle, and on foot, if traversed, shall be considered distributive, and the proof of either shall, *pro tanto*, entitle the defendant to a verdict, &c.

4. Where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of way with carriages and cattle, and on foot, in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if the right of way with cattle, or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not be so justified.

5. So, in plea of right of common, if defendant do not prove a right for all kinds of cattle, he is to have a verdict *pro tanto*.

5. And where in an action of trespass *quare clausum fregit* the defendant pleads a right of common of pasture for divers kinds of cattle, *ex. gr.* horses, sheep, oxen, and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict

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(*k*) Therefore defendant's partnership with plaintiff must be pleaded in trover, *Stancliffe* v. *Hardwick*, 3 Dowl. 762.

(*l*) *Pearcy* v. *Walter*, 6 Car. & P. 232.

shall pass for the defendant in respect of such of the trespasses proved, as shall be justified by the right of common so found, and for the plaintiff in respect of the trespasses which shall not be so justified.

6. In all actions the same rule to prevail as regards rights of way or common.

6. And in all actions in which such right of way or common as aforesaid, or other similar right, is so pleaded, that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively.

Of sham or false pleas. (m)

The recitals in ancient statutes,(n) and the confession of so eminent a pleader as Sanders in his reports,(o) that the Court had reproved him for pleading subtly on purpose to entrap the opponent and delude the Court, sufficiently establish historically that the science of special pleading has at all times occasionally been perverted and misapplied for the purpose of delay. The judges have also at all times testified their disapprobation and endeavoured to repress the practice. But they have been prevented from exercising any adequate restrictive powers by circumstances which may not be obvious to any common observer. By the common law a defendant has an unqualified right to plead any matter in bar of the action which he may think will constitute a defence, subject only to a demurrer if he be mistaken; and the statute 4 Ann. c. 16, only requires an affidavit in support of a plea *in abatement* and of a plea puis darrein continuance, and there is no authority for the Court or a judge requiring *any affidavit of the truth* of a plea *in bar*, unless the defendant by some accident has placed himself in a situation of being obliged to ask a favour, in which case just terms may be imposed. Occasionally, it is true, the judges have become indignant at the frequency of subtle false pleas, and have suffered judgment to be signed, and have sustained judgments signed for want of a plea, even without previous leave; but it will be found that according to the present practice, the instances in which a sham or false plea can be treated as a nullity are rare.(p) Nor indeed is there any reason for a strong exercise of power, if it exist, in

(m) See very fully 1 Chitty on Pleading, 5 edit. 574 to 578, and *most recently*, *id.* 6 edit.; Tidd, 564, 565, 473, and 1 Arch. K. B. 4th ed. 242 to 245. It will be observable from the cases collected in 1 & 2 Chitty's Rep. Index, tit. Pleading, that most of the cases relating to sham pleas occurred about that time.

(n) 32 Hen. 8, c. 30; 1 Bla. R. 270.

(o) 1 Sanders, 327 *a*.

(p) But if a sham plea of set-off on a recognizance in another Court be pleaded to one count, and non assumpsit to the others, the Courts have considered *that* a subtle plea requiring two distinct issues and trials, and gave the plaintiff leave to sign judgment, and made defendant's attorney pay costs, though he obeyed his instructions, *Vincent* v. *Groond*, 1 Chit. Rep. 182; *Munton* v. *Mockett*, *id.* 504;

setting aside any false plea at the present time; for if a plea be false, the plaintiff may immediately reply and try the issue, and if there be a demurrer to the replication according to the usual course of sham pleading, the margin of such demurrer must, according to the Reg. Gen. Hil. T. 4 W. 4, reg. 1, state the cause or point of demurrer; and according to the rule, if that be frivolous or unfounded, leave to sign judgment immediately, whether in term or vacation, may be obtained, (q) and an immediate execution issued after a writ of inquiry, which may be returnable in the vacation.

These observations may account for the silence in the recent rules respecting sham pleas, and the absence of any express rules upon the subject, which no doubt, upon consideration, were considered to have been rendered unnecessary by the numerous other regulations expediting proceedings during the vacation.

Judgment recovered.

There is, however, one express rule in almost the only case when it could be necessary, viz. relating to a *plea of judgment recovered*, which, as the time for producing the same could only be during the four terms, might otherwise, if put in issue, suspend the judgment for not producing the record until the *next term*, however notoriously false the plea might be. The practical Reg. Gen. Hil. Term, 4 W. 4, reg. 8, therefore ordered that the defendant, in the margin of a plea of judgment recovered, shall state the particulars by which it (i. e. the judgment) may be found on record, or plaintiff may sign judgment, and if a false statement be made, the plaintiff by leave also may sign judgment. The terms of the rule are thus: "Where a defendant "shall plead a plea of judgment recovered in *another Court*, he "shall in the margin of such plea state the date of such judg-"ment; and if such judgment shall be in a Court of record, "the number of the roll on which such proceedings are en-"tered, if any, and in default of his so doing the plaintiff shall "be at liberty to sign judgment as for want of a plea; and in "case the same be falsely stated by the defendant, the plaintiff, "on producing a certificate from the proper officer or person "having the custody of the records or proceedings of the "Court where such judgment is alleged to have been reco-"vered, that there is no such record or entry of a judgment as "therein stated, shall be at liberty to sign judgment as for

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and see several cases, *id.* 524 to 526, 564. So if a sham plea be so special as to render it necessary to consult counsel on replication, the Court permitted judgment, *Shadbolt* v. *Berthoud*, 2 Chitty's R. 335; 5 B. & Ald. 570; 1 Bing. 330; 2 B. & Cres. 81.

(q) *Underhill* v. *Gurney*, 3 Dowl. 495.

"want of a plea by leave of the Court *or a judge*."(r) The effect of this rule is to put an end to the utility of a *sham plea* of a judgment recovered in ordinary cases. But that rule does not extend to a plea by an executor or administrator of a judgment recovered against *him* by another creditor. (s)

VII. *Of Several Pleas.*

Of *double* pleas when allowed, and how to obtain leave to plead the same.(t)

Before the statute 4 Ann. c. 16, a defendant could only plead *one* plea. That statute enacted in sect. 4, "that it "shall and may be lawful for any defendant or tenant in "any action or suit, or for any plaintiff in replevin in any "Court *of record*,(u) with the leave of the same *Court*, to plead "as many several matters thereto as he shall think necessary "for his defence;" and then sect. 5 provides that the defendant shall pay costs of the pleas found against him, unless the judge who tried the issue shall certify that there was reasonable ground for pleading such pleas. It will be observed, that the liberty of pleading *several pleas* (*or double* as it is technically termed) is thus qualified, by requiring the *previous leave of the Court;* and the spirit and object of that enactment seems to have been best observed in the Court of Common Pleas, where, until the recent regulation, it was the practice in most cases to obtain the *express leave* of the Court on a *motion* and *rule nisi;* but soon after the passing of the stat. 4 Ann. c. 16, it became almost a matter of course in the Court of King's Bench for a defendant to plead as many pleas as he desired on a motion signed by counsel for a rule; and it was not usual for a plaintiff to apply to the Court to restrain the defendant from so doing excepting in very particular cases. By the *present practice* in most cases the *express* leave of a single judge at chambers to plead more than one plea must be obtained by summons and order, instead of troubling the Court in banc with applications of that nature, consuming more time than can be required on such questions, at least in the first instance; but the propriety of pleading such several pleas may afterwards be brought before the Court, who are still in all cases *supposed* to grant a *rule* pursuant to the statute.

The general pleading rules of Hil. T. 4 W. 4, reg. 5, in part before set forth,(v) qualifies or modifies the power of obtaining leave to plead double, so as to prevent an *unnecessary repetition* in a second or other plea of the *same ground of de-*

(r) See Jervis's Rules, 89, note (q).

(s) *Power* v. *Izod*, 1 Bing. N. C. 304; 3 Dowl. 140, S. C.

(t) See in general, 1 Chitty on Pleading, 5th edit. 592 to 599, and *id.* 6th edit.

(u) If in a Court *not of record* defendant plead two pleas, as nil debet and a set-off, plaintiff may treat the latter plea as a nullity, and make up issue, and try on the other, *Chitty* v. *Dendy*, 1 Harr. & Wol. 169.

(v) *Ante*, 455 to 459.

fence, once already stated, by thus ordering: "nor shall several pleas, or avowries, or cognizances, be allowed unless a "*distinct ground of answer or defence is intended to be esta-* "*blished in respect of each.*" And in a subsequent part of the same rule it is ordered that "*pleas, avowries,* and cogni- "zances founded on *one and the same principal matter, but* "*varied in statement, description, or circumstances only,* (and "pleas in bar in replevin, are to be within the rule,) *are not to* "*be allowed.*" And then we have seen such rule is illustrated by several examples, with exceptions, which of themselves constitute parts of the rule; but it is provided that the examples are given as instances only of the applications of the rules to which they relate, and that the principles contained in the rules are not to be considered as restricted by the examples specified. (*w*)

The 6th and 7th rules then provide the remedy for the violations of this rule; but it will be observed that as there must always be *an order of a judge* and *rule antecedent* to the pleading double, it can *rarely* occur that an application to a judge to strike out a second or third plea, as a violation of the fifth rule, can take place; however, certainly such an application may be, and indeed has been made.(*x*) On the other hand, however, some double pleas seem to have been expressly sanctioned by express rule, even without *a summons or judge's order*, (*y*) as non assumpsit or nil debet, or non detinet, with or without a plea of tender as to a part, a plea of the statute of limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, plene administravit, plene administravit præter, infancy and coverture; any two or more of which pleas might by that rule be pleaded together *as of course* without leave; but still a *rule to plead double* must be drawn up in pursuance of the statute 4 Ann. c. 16, by the proper officer, upon production of the engrossment of the pleas, or a draft or copy thereof.

Mode of obtaining leave when necessary.

It may be considered absurd that the expense of a *rule* should still be required when *in fact* the *Court* does not interfere; but this is requisite as long as the statute 4 Ann. c. 16, sect. 4, requiring such rule, continues unrepealed; and under the act the Court in banc still has jurisdiction, and will interfere to prevent *several* pleas, when their use would be *unjust or vexatious*.

To save the expense of a motion and rule nisi the general

(*w*) *Ante*, 455 to 459.

(*x*) *Biggs* v. *Maxwell*, 3 Dowl. 497; 1 Hodges, 18.

(*y*) Reg. Gen. Trin. T. 1 W. 4, reg. 14.

rule of Trinity Term, 1 W. 4, reg. 13, orders that *no rule* to show cause *or motion* shall be required in order to obtain a rule to plead several matters, or to make several avowries or cognizances; but that such rules shall be drawn up upon *a judge's order to be made upon a summons,* accompanied by a *short abstract* or statement of the intended pleas, avowries, or cognizances,(z) and then provides that *no summons or order shall be necessary* in the following cases, that is to say, where the plea of *non assumpsit* or *nil debet,* or *non detinet,* with or without a plea of tender as to a part, or plea of the statute of limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, *plene administravit, plene administravit præter,* infancy and coverture, or any two or more of such pleas, shall be pleaded together; but in all such cases *a rule shall be drawn up* by the proper officer upon the production of the engrossment of the pleas, or a draft or copy thereof.

CHAP. XXI. PRACTICE AS TO PLEAS.

In certain cases no summons necessary.

The Reg. Gen. Hil. Term, 2 W. 4, r. 34, however, orders that if a party shall plead several pleas, avowries, or cognizances, *without a rule* for that purpose, the opposite party shall be at liberty to sign judgment. (*a*)

A summons to plead several matters is a stay of proceedings, if it be returnable before or at the time the judgment office opens on the day after the time for pleading expires;(*b*) but then the defendant's attorney must carefully attend the *first* summons. It would seem that there is a peculiarity regarding a summons for leave to plead several pleas distinguishing it from other summons, which in their very nature in general render it pro-

Practice as respects a summons, &c. to obtain leave to plead double.

(z) James, Esq., late sheriff of Kent, *v.* C. D. } Let the plaintiff's attorney, or agent, attend me at my chambers in Serjeants' Inn to-morrow, at 11 of the clock in the forenoon, to show cause why the defendant should not be at liberty to plead the several matters specified in the abstract or statement *annexed* [*or* "subscribed," *according to the fact.*] Dated the 13th day of May, 1835. J. Vaughan.

Abstract of Pleas.

1. Non assumpsit.
2. That defendant hath indemnified.
3. That the action and recovery against the present plaintiff was not in respect of the seizure of the goods, but for damage and loss after seizure.
4. That present plaintiff was damaged of his own wrong.

Judge's Indorsement on Summons on hearing both Parties.

"Take an order to plead the first and "second pleas, and either the third or "fourth, but not both.

J. Patteson, May 14, 1835.

Take a week, J. Patteson.

(*a*) Jervis's Rules, 51, note (*i*); and see an instance, *Hockley* v. *Sutton,* 2 Dowl. 700. Before that rule plaintiff could not in K. B., though he might in C. P. treat as a nullity double pleas pleaded by a defendant, without having obtained a rule; but must have applied to the Court to set aside all but one; 1 Bos. & Pul. 415; Tidd, 658.

(*b*) *Wells* v. *Secret,* 2 Dowl. 447.

per that both parties should attend; viz. that as on principle a defendant ought not to be required to disclose to the defendant his grounds of defence,(c) so on that ground a summons for leave to plead several matters may, it is said, be heard by the judge in private in the absence of the plaintiff or his attorney,(d) so that the latter may not ascertain the particulars of the defence. (d) In general, however, the practice is otherwise, and a summons is obtained similar to the form in the note, (e) stating an abstract of the pleas at the foot, and a copy is to be served on the plaintiff's attorney as other summons; and at the time of hearing before a judge a fair copy of the draft of the plea, with the declaration, is to be produced; and in some cases it will be advisable to have an *affidavit* of the facts, stating that there is a good defence on the *merits*. In cases also where from particular circumstances it would be unjust that the defendant should plead several pleas, an *affidavit* of those facts might be desirable *in opposition* to the summons. (*f*) The *judge's order* should be forthwith drawn up and served, for otherwise it may be treated as a nullity;(*g*) and the *rule* for pleading several matters must also be drawn up, or the pleas may be treated as nullities, and judgment signed as by default;(*h*) indeed the Reg. Gen. Hil. Term, 2 W. 4, r. 34, is express upon that requisite. (*i*)

What double pleas allowed. (*j*)

With the exception of the instances of several pleas that are to be allowed enumerated in the Reg. Gen. Trin. T. 1 W. 4, reg. 13, (*k*) the injunction that two or more pleas of the *same subject-matter of defence*, varied only in *statement*, &c. as expressed in Reg. Gen. Hil. T. 4 W. 4, reg. 5, it will be found that the like *discretionary* jurisdiction is now transferred to a single judge at chambers, which, by the terms of 4 Ann. c. 16, s. 4, was vested in the *Court in banc;* and the discretion of a single judge in allowing *several* pleas is to be influenced by the same principles that before governed the *Courts;* and no new rule or qualification, except as above, has been introduced, and therefore the decisions collected in prior works of practice will still continue to be applicable. The objection that the proposed pleas are *inconsistent with each other* (unless the re-

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(*c*) *Southgate* v. *Crowley*, 1 Hodges, 5.
(*d*) *Leuchart* v. *Cooper*, 1 Hodges, 18.
(*e*) See note (*z*), *ante*, 733.
(*f*) *Semble*, see an instance, *Biggs* v. *Maxwell*, 3 Dowl. 497.
(*g*) *Ante*, 566.
(*h*) *Hockley* v. *Sutton*, 2 Dowl. 700.
(*i*) *Ante*, 733, n. (*a*).
(*j*) See in general 1 Chitty on Pleading, 5th ed. 592 to 599.
(*k*) *Ante*, 732, 733, and confined to non assumpsit, nil debet, and non detinet, with statute of limitations, set-off, bankruptcy, discharge under insolvent act, plene administravit, plene administravit præter, infancy, and coverture.

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pugnancy would appear by some act or matter of record, as where the payment of money *into Court* is pleaded, or a tender) has no weight; and upon a summons to show cause why the plaintiff should not be at liberty to strike out certain pleas because they were inconsistent with each other, Williams, J. said, "The fact of inconsistency in the pleas with each "other is no objection to them. A defendant may have "several defences to an action, each good in itself, but incon- "sistent with each other. It would be very hard upon him if "he were not permitted to plead them all. The rule is much "more strict as to plaintiffs, who are only allowed one count to "each cause of action. The reason however there is dif- "ferent." (*l*) And in another case the defendant was allowed to plead to indebitatus assumpsit for work and labour, first, non-assumpsit to the whole; and, secondly, that the demand arose out of an illegal wager as to the price of tallow; and Bosanquet, J. said, "The word '*inconsistent*' was studiously "kept out of the rules, for the subject was discussed; and "it was felt that there might be cases in which pleas might "be inconsistent with each other, and sustain substantially "different defences; and the object had in view was to pre- "vent the *same* defence being pleaded in *different forms*." (*m*) So, notwithstanding the 5th rule of Hil. T. 4 W. 4, prohibiting more than one plea of the same subject-matter, the Court, in an action of trover, permitted several pleas, viz. 1. The general issue, not guilty; 2. A lien by custom; 3. A lien by agreement; 4. Another plea of lien by custom, somewhat varied; and, 5. Another varying plea of lien by custom; and Tindal, C. J. said the plaintiff could suffer no loss, for if the judge on the trial should be of opinion that no distinct subject-matter of defence was bonâ fide intended to be established in respect of each plea then allowed by the Court, he might certify that the defendant should not recover any costs on the issues arising out of such plea. (*n*) So in another case the defendant was, on application to the Court in banc, although a judge at chambers had refused the same, allowed to plead, 1. As to 12*l.* the bankruptcy of the defendant; 2. As to 23*l.* payment; 3. As to 1*l.* 2*s.* 6*d.* accord and satisfaction; and, 4. As to the demand, except 24*l.* 2*s.* 6*d.*; the general issue, that he never owed the amount; the Court thinking that upon the explained circumstances all such pleas were

(*l*) *Williams* v. *Small*, 3 Dowl. 564.

(*m*) *Dueer* v. *Triebner*, 1 Bing. N. C. 266; 3 Dowl. 133.

(*n*) *Leuckart* v. *Cooper*, 1 Bing. N. C. 509; 1 Hodges, 16; 3 Dowl. 415, *sed quære*.

reasonable. (*o*) So assignees of a bankrupt, sued as assignees of a lease, may plead, 1. That the term did not vest in them; and, 2. That they abandoned it, the latter being a special mode of denying that the term vested, that would not be admissible in evidence under the first plea. (*p*)

But the Court will not allow several pleas when one of them on the face of the record would establish that the other is untrue. Therefore in assumpsit for goods sold and delivered the Court refused to allow the defendant to plead non-assumpsit to the *whole* and a tender to part; nor to plead, 1. Non-assumpsit; 2. Payment as to part; 3. As to part that the goods were warranted with a sample; 4. As to part that the goods were warranted of a merchantable quality; and, 5. As to part that they were warranted to be one ton weight of black lead; and the Court said the first must be disallowed, because it was contradicted by the plea of payment as to a part; and the fourth, founded on the implied warranty in law, must also be disallowed, for it was rendered needless by the third. (*q*) Nor will the Court suffer *several* pleas to stand contrary to the admissions of the defendant and the justice of the case, and where the plaintiff might incur difficulty or expense in making out his strict right, as frequently has occurred in actions of covenant by a reversioner claiming by a long derivative title. (*r*) And where a defendant may by statute, as 11 Geo. 2, c. 19, s. 21, plead the general issue, and under it give in evidence the special matter, the Court will not give him leave, in addition to the general issue, to plead a special plea, but put him to his election to abandon the general issue or to plead only special

(*o*) *Hart* v. *Bell*, 1 Hodges, 6.

(*p*) *Thompson* v. *Bradbury*, 3 Dowl. 147.

(*q*) *Steel* v. *Sturry*, 3 Dowl. 133.

(*r*) In C. P. in *White* v. *Parker*, A. D. 1833, covenant by plaintiff, as a fourth assignee of a lessee, against the defendant, as assignee of the lessor, a reversioner in fee, on lessor's covenant to pay out-going valuation of trees in a nursery-ground, and showing plaintiff's derivative title, and that a valuation had been made by the defendant's authority, the defendant, by leave of a judge, pleaded non est factum, and traversed *every stage* of plaintiff's derivative title, and the conveyance of reversion to the defendant, and denial of there being any trees, and of defendant's authority to make the valuation, or that any valuation was made. But the Court of C. P. on affidavit that the plaintiffs, as assignees, had frequently paid rent to the lessor *and the defendant also*, struck out the plea of non est factum of the lease and all the traverses of *plaintiff*'s title, but permitted the defendant's pleas denying the conveyance to him, and the subsequent pleas to stand.

Again, in *Craigh* v. *Struck*, K. B. 25th February, 1830, where several pleas in covenant traversing the plaintiff's derivative title, as well as pleas denying the breaches of covenant, on affidavit by the plaintiff that the defendant had allowed *and paid rent to the plaintiff*, on motion to the Court Mr. Justice Bayley ordered the rule to plead the several pleas to be rescinded, and the pleas to be confined to the breaches of covenant.

And see in general that the Court will not allow an unjustly embarrassing plea to be pleaded with others, 13 East, 255; 3 Bing. 635; 1 Moore & P. 345; 4 Bing. 525; 5 Bing. 42; 6 Bing. 197.

pleas. (*s*) So where a defendant by the neglect of her attorney had omitted to plead in time, and judgment by default had been signed but set aside on an affidavit of merits, he was not allowed afterwards to plead several matters; one of such pleas being that the plaintiff, an attorney, had not delivered a signed bill, and another, that he had not obtained his certificate; Parke, B. saying she ought not to be let in to plead such pleas after judgment had been set aside on an affidavit of merits. (*t*)

VIII. Of applications to set aside pleas.

VIII. If a plea be *frivolous, or tender an immaterial issue,* the plaintiff may apply to a judge to set it aside; (*u*) and it is in general advisable to do so rather than to demur and lose time in arguing the objection. (*u*) So if a plea has been pleaded contrary to implied good faith, as if after a judgment for want of plea has been set aside on an affidavit of merits, and the defendant has been let in to plead, and, contrary to the spirit of such permission, he plead a technical objection foreign to the merits, as if to an action by an attorney to recover the amount of his bill of costs for business done for the defendant, the latter plead that the plaintiff was not certificated, or that he had not delivered his signed bill a month, the Court will on motion set aside such pleas. (*x*) We have also seen that if two or more pleas of the *same subject-matter or ground of defence* have been pleaded in contravention of Reg. Gen. Hil. T. 4 W. 4, reg. 5, a distinct application may be made to a single judge at chambers to strike out all but one; (*y*) and if *a single* judge should inadvertently give leave to plead several pleas, the defendant may (we have seen) apply to the Court and have the rule to plead double rescinded. (*z*)

IX. Of several defendants joining or separating in their pleas.

IX. The rules of law with respect to pleas by *several defendants,* constitute an important part of the science of pleading, and will be found fully considered in a work devoted entirely to that subject. (*a*) We can here only notice some points of *practical* importance. Sometimes the several defendants do not act in concert, and not unfrequently one suspects that the other defendant is in collusion with the plaintiff. In any case where perfect confidence does not prevail the defendants should defend and plead separately. Indeed if there be several defendants

(*s*) *Neale* v. *M'Kenzie*, 1 Crom. M. & R. 61; 2 Dowl. 702; 4 Tyr. 670, S. C.

(*t*) *Biggs* v. *Maxwell*, 3 Dowl. 497.

(*u*) *Rix* v. *Kingston*, 3 Dowl. 159.

(*x*) See note (*t*) *supra*.—The reader is requested to excuse this inadvertent repetition.—*Nanney* v. *Kenrick*, 1 Dowl. 616; *Holmes* v. *Grant*, 1 Gale, 59; 3 Dowl. 497.

(*y*) *Ante*, vol. iii. 455 to 459, 475; and see proceedings to strike out a second count, *ante*, 455 to 459.

(*z*) *Ante*, 455 to 459, 736, note (*r*).

(*a*) 1 Chit. on Pleading, 5 ed. 596 to 599.

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they must plead separately, or only one counsel will be allowed to address the jury upon the trial on the behalf of all, though even then several counsel may appear, and each may cross-examine witnesses for every defendant. (*b*) In a case of importance, and when one of several defendants desires to employ a separate attorney, he should do so, and appear and plead, and deliver a brief or briefs separately; in which case the counsel retained for him separately will have a right to address the jury and cross-examine witnesses, and in general sustain a separate defence. (*b*) But if several defendants substantially employ the same attorney, who *virtually* conducts all the defences, then, although *nominally* several attornies be employed, *double* charges in taxation will not be allowed. (*c*)

(*b*) *Bishop* v *Bryant*, 6 Car & P. 485. 2 Dowl 334, 2 Crom. & M 416, S. C.,
(*c*) *Nanny* v. *Primrose and another*, *Starling* v. *Cozens and others*, 3 Dowl. 782.

CHAPTER XXII.

OF DISCONTINUING;—OF THE REPLICATION, REJOINDER, AND SUBSEQUENT PLEADINGS BETWEEN PLEA AND DELIVERY OF ISSUE;—OF PLEAS OF MATTER OF DEFENCE THAT HAS ARISEN PENDING THE ACTION; — AND OF SPECIAL CASES AFTER ISSUE AND BEFORE TRIAL.

CHAP. XXII.

Outline of subject.

The recent alterations in practice as regards discontinuing, and respecting replications, rejoinders, and subsequent pleadings, are, comparatively with those relating to declarations and pleas, but few; and after noticing them, and adding a few observations, it must suffice to refer to prior works on the practice of *discontinuing* and *requisites* of *those parts* of pleading, (*a*) and the practical modes of conducting them. (*b*)

I. Of Discontinuing.

If upon receiving the defendant's plea the plaintiff be advised that he has no sufficient answer, he may, to avoid an increase of costs, *discontinue his action,* although he may do so at much later stages, and even after a trial and rule obtained to enter a nonsuit or new trial. (*c*) But as perhaps the defendant may not press on the action, a plaintiff need not take any step to discontinue until the defendant has actually ruled him to reply, when he must reply, or suffer a non-pros, or discontinue; and even then there may be cases where it will be advisable to reply rather than to submit to the payment of costs, which still perhaps the defendant may not press for. However, when it is certain that the defendant will proceed for a judgment of non-pros, or of judgment as in case of a nonsuit, and the action cannot be sustained, or the defendant be so insolvent as to render it inexpedient to incur more costs, the least expensive course may be to discontinue; previously however should be

(*a*) 1 Chitty on Pleading, 5 edit. 609 to 691; and see the great additions in 6 edit.

(*b*) Tidd, 9 edit. 676 to 694; 1 Arch. K. B. 255 to 258.

(*c*) See in general Tidd, 9 edit. 678, 679; 2 Arch. K. B. 4 ed. 897; and see *Paterson* v. *Powell*, 3 M. & Scott, 195; 2 Dowl. 738.

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considered the consequences of such *primâ facie* admission that the action is not sustainable, in case an action for a malicious arrest should be brought, and which might be encouraged by the plaintiff's early admission that he would not prosecute his claim. The only material recent alteration in the practice relating to *discontinuing* is, that Reg. Gen. Hil. T. 2 W. 4, reg. 6, orders that "Now in all the Courts at Westminster, to "entitle a plaintiff to discontinue after plea pleaded, it shall "not be necessary to obtain the defendant's consent; but the "rule *shall contain an undertaking* on the part of the plaintiff "to pay the costs, and a consent that if they are not paid "within four days after taxation, defendant shall be at liberty "to sign a non-pros." The rule to discontinue is now absolute in the first instance, (*d*) whilst before it was a rule to show cause in the Common Pleas, unless the defendant would consent to a rule in the Treasury Chamber in term time, or before a judge in vacation; but the necessity for which is now dispensed with, and the provision for a judgment of non-pros, thus better securing the payment of costs, is new. (*e*) Cases may occur in which upon a special affidavit and motion the plaintiff may obtain leave to discontinue *without paying costs*, though it is laid down generally that costs must be paid. (*f*) Where, however, proceedings had been commenced on a bill of exchange against the drawer, and also against the acceptor of a bill of exchange, and the former paid the debt and costs of the action against himself, and the bill was thereupon delivered up to him, and notice given to the acceptor that proceedings against him were abandoned, it was held that the plaintiff must pay the acceptor's costs of defence, as he disputed his acceptance; and a judge's order for staying proceedings without costs was set aside. (*g*) But where a defence was carried on in the name of a person not an attorney of the Court in which the action was brought, the plaintiff was allowed at a late stage in the cause to discontinue without costs, on payment only of sums, if any, advanced by the defendant to such attorney. (*h*) Where a plaintiff served a rule to discontinue after

(*d*) Tidd, 685.

(*e*) Jervis's Rules, 71, note (*d*). In 2 Arch. K. B. 4 ed. 899, it is supposed that an *attachment* for non-payment of such costs could not be obtained; but *semble*, that upon a rule as now drawn up it would be otherwise, as it must contain an *undertaking* to pay.

(*f*) See 8 Eliz. c. 2, s. 2; Comb. 299; 2 Arch. K. B. 4 ed. 897, 898 If a defendant have become bankrupt or insolvent pending an action, though seemingly solvent when it is commenced, that may be an answer to a rule nisi for judgment as in case of a nonsuit, for not trying; and the same principle would extend to permit a plaintiff to discontinue without costs in such a case.

(*g*) *Lewis* v. *Dalrymple*, 3 Dowl. 433.

(*h*) *Paterson* v. *Powell*, 2 Dowl. 738; 3 M. & Scott, 195, S. C.

having given a peremptory undertaking to try at the sittings after term, and the costs were taxed, but not paid, it was held that the defendant was bound to sign judgment of non-pros under the rule, and was not justified in taking the more circuitous course of moving for judgment as in case of a nonsuit. (*i*)

II. REPLICATIONS. (*k*)

As it is in general the interest of the plaintiff to expedite his suit as much as practicable, it is incumbent on his attorney to obtain instructions for the replication immediately he has even intimation what will be the pleas. If the pleas merely contain denials of the whole or parts of the declaration, and properly conclude to the country, then probably the plaintiff will merely have to add what is technically termed the *similiter*, i. e. "*And the plaintiff doth the like;*" and then the plaintiff's attorney *may* immediately deliver the issue (the nature of which will presently be considered) with notice of trial, or he may delay so doing until ruled by the defendant to enter the issue. But if the plea or pleas state any new matter, as has become very frequent since the new pleading rules of Hil. T. 4 W. 4, then further and more precise instructions may be necessary in addition to the instructions recommended to be obtained before the commencement of the action, (*l*) and before the declaration. (*m*) If the defendant should truly plead payment of part before the commencement of the action, and which the plaintiff ought properly to have admitted in his declaration according to the suggestions before noticed; (*n*) then it may be necessary to enter a *nolli prosequi* as to so much of the demand as was satisfied by such payment; because if the plaintiff were to reply denying such payment, then on proof of the payment he would have to pay the costs of that issue which must be found against him. (*o*) But if, admitting such payment, the plaintiff really had a claim for the same kind of debt as that stated in the declaration, and to which the payment does not refer, then the plaintiff must *new assign* that he sued for such other debt, and thus avoid the effect of the plea: hence in each case inquiry into the precise facts may be essential before replication; but

(*i*) *Cooper* v. *Holloway*, 1 Hodges, R. 76.

(*k*) As to the requisites and forms of replications, see in general 1 Chitty on Pleading, 5 edit. 609 to 691, and 6 edit. more fully; and as to the *practice*, see Tidd, 9 edit. 676 to 694; 1 Arch. K. B. 255 to 258, and the few following subsequent rules and decisions.

(*l*) *Ante*, vol. iii. 117 to 125.

(*m*) *Ante*, vol. iii. 429.

(*n*) *Ante*, 472, and Bosanquet's Rules, 51, note 46, 85, note (*x*), 87, 102, note (*x*).

(*o*) Bosanquet's Rules, 102, note (*a*).

CHAP. XXII. II. REPLICATIONS.

in general in practice the replication is considered too much of course, and many practitioners do not sufficiently exert themselves to inquire into the facts, which may very materially affect the form and substance of the replication. In general, when the pleas distinctly state *new facts*, a very minute inquiry into them, and consideration which of several answers to the pleas shall be adopted, may be essential before the counsel or pleader is instructed to prepare the replications; and the safest and most expeditious course will be to consult him in the first instance, what further inquiries into facts may in each particular case be essential, unless the earlier instructions have been so ably framed as to anticipate every inquiry throughout the action; thus we will suppose a declaration on a bill of exchange at the suit of a remote indorsee against the acceptor, and that the defendant has pleaded usury, the replication may be either a denial of the usury, or may be that the plaintiff is an indorsee for value without notice, but not both; hence it may be necessary to ascertain whether there was any usurious contract as described that can be proved; and if there be any risk of that objection being proved, then whether the evidence will establish that the plaintiff or an intermediate indorsee received the bill for value and without notice and before it was due. It is of no avail to instruct counsel to prepare the replication before the precise state of facts has been ascertained, and no time should be lost in the inquiry.

Recent regulation affecting the *form and requisites of replications* and subsequent pleadings.

There are but few recent regulations respecting either the form or requisites of replications or the practical proceedings relating to them, for the principal objects in view have been the improvements in shortening *declarations*, especially in preventing the use of more than one count, and in putting an end to the too general use of the *general issue*, and requiring most matters to be *pleaded specially*, so as to apprise the plaintiff of the intended defence, and cause a specific, certain, and limited issue to be joined and tried by a jury, and by requiring a *sufficient ground of demurrer*, or at least an arguable ground, to be stated in the margin of every demurrer, or in default thereof enabling the plaintiff to obtain a speedy judgment. It is to be regretted that some ameliorations have not as yet been extended to replications. There are however a *few improvements* in the forms of replications and in the practice respecting them which may be thus enumerated:—

1st. As regards the *title* of a replication, it is to be of the

very day when it is pleaded.(*p*) 2ndly. *Venue* is not to be repeated excepting when local description is necessary.(*q*) 3rdly. The *commencements* and *conclusions* may be more concise than heretofore; and the provision that the allegation "*precludi non*" and prayer of judgment is not *necessary* when the replication applies to the *whole* cause of action,(*r*) except when an estoppel is pleaded. 4thly. *Protestations*, formerly occurring more frequently in replications than other pleadings, are abolished.(*s*) 5thly. All traverses are to conclude to the country, and not as heretofore was too frequently the case with a verification.(*t*) 6thly. There are prescribed forms or outlines of replications to a plea of payment of money into Court.(*u*) 7thly. Reg. Gen. Hil. Term, 2 W. 4, reg. 107, directs that it shall not be necessary that any pleadings which conclude to the country be *signed by counsel*.(*x*) 8thly. We have seen that by Reg. Gen. Hil. Term, 4 W. 4, reg. 1, *all pleadings*, of course including replications, shall be *delivered* and not filed.(*y*)

Consequence of no similiter or perfect issue joined.

A *proper conclusion* to a replication may be so important that if there be not on the face of the record of nisi prius an issue substantially joined between the parties the judge may refuse to try the cause; as where there was a plea of no consideration to a declaration on a bill by drawer against acceptor

Title.

(*p*) By 1st general rule of Hil. T. 4 W. 4, "Every pleading shall be intituled of "the day of the month and year when the same was pleaded, and shall bear no other "time or date."

Venue.

(*q*) By 8th general rule of Hil. T. 4 W. 4, "No *venue* shall be stated in any "pleading, provided that in cases where local description is now required such "local description shall be given."

Precludi non and prayer of judgment when unnecessary.

(*r*) The 9th general rule of Hil. T. 4 W. 4, orders that "It shall not be *necessary* "in any replication or subsequent pleading intended to be pleaded in maintenance "of the whole action, to use any allegation of '*precludi non*,' or to the like effect, or "any *prayer of judgment*; and all replications and subsequent pleadings pleaded "without such formal parts as aforesaid shall be taken, unless otherwise expressed, as "pleaded in maintenance of the whole action, provided that nothing herein contained "shall extend to cases where an estoppel is pleaded."

Protestation.

(*s*) By 12th general rule of Hil. T. 4 W. 4, "No protestation shall hereafter be "made in any pleading; but either party shall be entitled to the same advantage in "that or other actions as if a protestation had been made."

Special traverses.

(*t*) By 13th general rule, 4 W. 4, "All special traverses with an inducement of "affirmative matter shall conclude to the country, provided that this regulation shall "not preclude the opposite party from pleading over to the inducement when the "traverse is immaterial."

Replication to a plea of payment of money into Court.

(*u*) By 19th general rule of Hil. T. 4 W. 4, "The plaintiff, after the delivery of "a plea of payment of money into Court, shall be at liberty to reply to the same by "accepting the sum so paid into Court in full satisfaction and discharge of the cause "of action in respect of which it has been paid in, and he shall be at liberty in "that case to tax his costs of suit, and in case of nonpayment thereof within forty-"eight hours to sign judgment for his costs of suit so taxed; or the plaintiff may reply "'that he had sustained damages,' (or, 'that the defendant is indebted to him,' "as the case may be) to a greater amount than the said sum; and in the event of an "issue thereon being found for the defendant, the defendant shall be entitled to "judgment and his costs of suit."

(*x*) Jervis's Rules, 71, note (*e*).

(*y*) Reg. Mich. T. 1 W. 4, reg. 7; Exchequer Reg. Gen. Hil. T. 4 W. 4, reg. 1.

CHAP. XXII. II. REPLICATIONS.

and there was no replication in the record, the learned judge refused to try the cause, but struck it out of the paper, though he said if the plaintiff had replied and concluded with—"And "this he prays may be inquired of by the country, &c." perhaps the "&c." might be supposed to imply a *similiter*; (z) and in a subsequent case a learned judge acted upon the last suggestion. (a)

When the defendant's plea has concluded to the country, and the plaintiff is not desirous to proceed expeditiously to trial, he may, whether or not ruled to reply, deliver a replication, consisting of what is technically called the similiter, viz. "And the plaintiff doth the like." And when the plaintiff's replication concludes to the country he may then deliver it in that state. But in both these cases we shall find, when considering the issue, that instead of the plaintiff's delivering the similiter in the first case, or his replication in the second case separately, he may add the similiter for the defendant, and make up the entire issue, and give notice of trial, so as to expedite the proceedings when he is ready and anxious to try.

Subscribed will be found the ordinary commencements and conclusions of replications since these new regulations. (b)

Reg. Gen. Hil. T. 2 W. 4, reg. 108, dispensing with the rule to rejoin.

Formerly, although the plaintiff's replication concluded to the country it was necessary for him in the Common Pleas, be-

(z) *Rowlinson* v. *Roantre*, 6 Car. & P. 551; and see *Wordsworth* v. *Brown*, 3 Dowl. 698.

(a) *Swain* v. *Lewis*, 3 Dowl. 700; *Clark* v. *Nicholson*, 6 Car. & P. 712; 1 Gale, 21; 3 Dowl. 454, S. C.; 1 Chitty on Pleadings, 5th ed. 631.

(b) In the K. B. [*or* "C. P." *or* "Exchequer of Pleas."]

On the day of in the year of our Lord 1835.

1. Commencement.

A. B. v. C. D. } The plaintiff as to the first plea of the defendant says, that—

2. Similiter.

A. B. v. C. D. } The plaintiff as to the first plea of the defendant whereof he hath put himself upon the country doth the like.

3. To part of cause of action.

4. Conclusion to the country.

A. B. v. C. D. } The plaintiff as to the (second) plea of the defendant says that he the plaintiff, by reason of any thing by the defendant in that plea alleged, ought not to be barred from maintaining his action thereof against him the defendant, because he says that—

5. Do. with a verification.

And this he the plaintiff prays may be inquired of by the country, &c.

6. Do. with a verification *to part* of the cause of action in assumpsit with prayer of judgment.

And this he the plaintiff is ready to verify.

And this he the plaintiff is ready to verify, wherefore he prays judgment, and his damages by him sustained on occasion of the nonperformance of the promises in the said (second count *or*) plea mentioned to be adjudged to him.

fore he could make up the issue or give notice of trial, to give the defendant a four-days' rule to rejoin, though the practice was more expeditious in K. B.; (c) and now, by Reg. Gen. Hil. Term, 2 W. 4, reg. 108, it was ordered, "that in all special "pleadings where the plaintiff takes issue on the defendant's "pleading, or *traverses* the same or *demurs*, so that the defend-"ant is not let in to allege any *new* matter, the plaintiff may "proceed without giving a rule to rejoin." This regulation, preventing in many cases the necessity for a *four-day rule*, tends to expedite the cause, and save useless expense, and the plaintiff may, when his replication concludes to the country, immediately add the similiter and make up the issue, and give notice of trial.

Other requisites of replications.

In all other respects replications are to be framed as heretofore, and the rules enumerated in another work will be found to be still applicable. (*d*) All the recent decisions relative to those former rules, with new forms, will be found collected in the sixth edition of that work. It is however proper to observe, that the spirit of conciseness introduced by the new pleading rules should be extended to replications in all cases besides those thus expressly provided for; as for instance, in denying a prescriptive or other right of way or of common, or other rights stated in a plea, it is not necessary to repeat every word of the description of the right in the plea, but the replication may concisely deny the right by alleging "that the defendant was not nor is entitled to such way or such common of pasture as in the plea alleged," and this the plaintiff prays may be inquired of by the country, &c. (*e*)

Of compelling the plaintiff to reply or submit to non pros.

Supposing that the plaintiff is reluctant to proceed, and the defendant is certain that the action is not sustainable, (*f*) he may at any time, even immediately after he has duly pleaded, rule the plaintiff to reply, which expires in four days, exclusive of the day when a copy thereof was served, (*g*) and Sunday or a holiday, unless the last, is to be reckoned as one of such days. (*h*) Before the defendant could sign judgment of non

(*c*) Tidd, 718; Jervis's Rules, 71, note (*f*).

(*d*) 1 Chitty on Pleading, 5 edit. 609 to 691.

(*e*) And see a form, Bosanquet's Rules, 126.

(*f*) See the observations, *post*, 785, as to motions for judgment in case of a nonsuit very frequently occasioning a recovery against a defendant, which otherwise might never have occurred, and for the same reason a rule to reply should never be given, unless it be certain that the plaintiff cannot recover.

(*g*) Tidd, 676; Imp. C. P. 342; Sellon, 368; Dax Pr. 61; Price Pr. 244.

(*h*) Reg. Trin. 1 Geo. 2, Tidd, 676.

pros against the plaintiff, the Reg. Gen. Trin. T. 1 W. 4, required a *demand in writing* four days before judgment could be signed; but that rule was shortly afterwards annulled by Reg. Gen. Hil. Term 2 W. 4, reg. 54, presently stated. The Reg. Gen. Hil. Term, 2 W. 4, reg. 53, orders, that "a rule to reply "may be *given at any time* whenever the office is open." Before which rule the practice varied in the different Courts, and could only be given within a limited number of days after each term, but now it may be given at any time in the vacation, unless during the excepted days in the long vacation and close holidays. (*i*)

Formerly it sufficed to *enter* in the proper office a rule to reply, and it was not necessary to serve it, but then a demand of replication was required; now a copy of the rule must be *actually served*, and a demand of replication is expressly dispensed with, as the service of the rule to reply operates as a sufficient demand. (*k*) The Reg. Gen. Hil. T. 2 W. 4, reg. 54, orders, "that the *service* of a rule to reply or plead any "subsequent pleading, shall be deemed a sufficient demand "of a replication or such other subsequent pleading," since which rule no demand of a replication or rejoinder, surrejoinder or rebutter, is necessary.

If upon being thus ruled, the plaintiff be not ready to reply within the four days, he may from time to time take out summonses and obtain an order for such further time as the judge shall think fit. (*l*)

III. REJOINDERS, SURREJOINDERS, REBUTTERS AND SURREBUTTERS.

The General Rules of Hil. T. 4 W. 4, reg. 1, 8, 9, 12 and 13, which we have just seen regulate the title of a replication, the omission of venue, the commencement and conclusion, the omission of protestation, and the direction that all traverses shall conclude to the country, *equally apply to rejoinders, surrejoinders, rebutters and surrebutters*, and no pleading in any stage that concludes to the country need be signed by counsel; (*m*) and it is scarcely necessary to repeat that all these must now be *delivered* and not filed. (*n*) Whenever the pleading in any stage, and however denominated, introduces *new matter*, it should *conclude* with a *verification*, in order that the opponent

(*i*) Jervis's Rules, 56, note (*c*).

(*k*) Per Tindal, C. J. in *Pound* v. *Lewis*, 2 Dowl. 744; 3 M. & Scott, 210, S. C.

(*l*) Tidd, 676; Impey's C. P. 342.

(*m*) Reg. Gen. Hil. T. 2 W. 4, reg. 102, *ante*, 743.

(*n*) Reg. Gen. Hil. T. 4 W. 4, reg. 1.

may have an opportunity of demurring or answering it, as he may be advised; but if the pleading merely *deny matter previously pleaded* by the opponent, although by a formal traverse, it must, according to the Reg. Gen. Hil. T. 4 W. 4, conclude to the country; and the form of such conclusion by a *defendant* is, "*And of this the defendant puts himself upon the country.*" And by a plaintiff, "*And this he prays may be inquired of by the country;*" and upon either of these the *similiter* is to be added in these words, "And the plaintiff (or the defendant) doth the like;" whereupon an *issue* (consisting of an affirmative and negative of some *fact,*) is said to be completely joined. The next step is to have all the pleadings on each side fairly copied continuously, commencing with a statement of the time of issuing the first writ, and concluding with an award of the venire in the form stated in a subsequent chapter; and such issue may be indorsed with a proper *notice of trial* to the defendant, or such notice may be given upon a separate paper. The *nisi prius record* is then to be engrossed and *duly entered for trial*, and the *jury* are to be *summoned* to try the existence of the fact or facts disputed in the issue.

Rejoinders, requisites and forms of. (*o*)

Rejoinders are governed by the same rules as pleas, with this additional quality, that a rejoinder must not *depart* from, but adhere to the same ground of defence as that advanced by the plea, (*o*) and the Courts have no power to permit *two* rejoinders, as they may severally plead under the statute of Ann. (*p*) When a defendant is under the terms of *pleading* issuably, he must in K. B. also *rejoin* issuably, (*q*) though we have seen that the terms *rejoining gratis* (in general dispensing with the necessity for a four-days' rule to rejoin, and rendering it incumbent to rejoin within twenty-four hours after demand,) (*r*) does not extend to a joinder in demurrer. (*s*) The formal parts of rejoinders in the notes will show the practical application of the above rules. (*t*)

(*o*) See in general 1 Chitty on Pleading, 5th edit. 689. 690.
(*p*) *Dunn* v. *Vacher*, 2 Stra. 908.
(*q*) *Ante*, 708.
(*r*) *Jones* v. *Key*, 2 Dowl. 266; *Clark* v. *Adams*, 2 Crom. & Jer. 583; 2 Tyr. 755.
(*s*) *Jones* v. *Key*, 2 Crom. & M. 340; 4 Tyr. 238; 2 Dowl. 266.

(*t*) In the K. B. [*or* " C. P." *or* " Exch."]

1. Commencement of rejoinder to the whole cause of action.

C. D. ats. A. B. } On the —— day of ——, in the year of our Lord 1835. The defendant, as to the replication of the plaintiff to the (first) plea of the defendant, says that—

CHAP. XXII. IV. OF PLEADING MATTER THAT HAS ARISEN PENDING THE ACTION.

Matters in *abatement* or in *bar* arising *pending an action,* whether before or after issue joined, were always *pleadable,* subject to some restrictions; as if a feme sole plaintiff marry pending an action, or the plaintiff release the action, or the defendant become bankrupt and obtain his certificate, either of these matters are pleadable, the first *in abatement* the latter *in bar.* If the matter arose before issue joined, and before any continuances were entered on the record, they were pleaded as to the *further* maintenance of the suit, and if after then, they were termed pleas *puis darrein continuance.* (u) The Reg. Gen. Hil. T. 4 W. 4, reg. 2, having abolished the entry of continuances except the juratur ponitur in respectu, it therefore became necessary to introduce new rules respecting pleas of matter arising pending an action, and they are no longer to be termed pleas *puis darrein continuance;* thus the same rule orders, " that in all cases in which no entry of continuances, by way of imparlance, *curiâ advisari vult, vicecomes non misit breve,* or otherwise, shall be made upon any record or roll whatever, or in the pleadings, except the juratur ponitur in respectu, which is to be retained; provided that such regulation shall not alter or affect any existing rules of practice as to the *times* of proceeding in the cause; and provided also, that in all cases in which a plea puis darrein continuance is now by law pleadable in banc or at nisi prius, the same defence may be pleaded with an allegation that the matter arose ' *after the last pleading or the issuing of the jury process,*' as the case may be. Provided also, that no such plea shall be allowed unless accompanied by *an affidavit* that the matter thereof arose *within eight days* next before the pleading of such pleas, or unless the Court or a judge shall otherwise order."

2. Commencement of rejoinder to part of the cause of action.

C. D. ats. A. B. } The defendant as to the replication of the plaintiff to the (second) plea of the defendant, says that the defendant ought not, by reason of any thing by him in that replication alleged, to maintain his action thereof against him the defendant, because he says that—

3. Conclusion to the country.

And of this he the defendant puts himself upon the country, &c.

4. Conclusion with a verification to whole cause of action.

And this he is ready to verify.

5. Conclusion with verification to part of cause of action, with a prayer of judgment.

And this he the defendant is ready to verify, wherefore he prays judgment if the plaintiff as to the said (second) count of the declaration ought to maintain his action thereof against him the defendant.

(u) As to those pleas in general, see 1 Chitty on Pleading, 5 edit. 695 to 700, and 6 edit. more fully; and see forms of pleas, 3 ed. 1238 to 1245.

This regulation, requiring the plea with an affidavit, that the subject-matter of the plea arose *within eight days* of the day on which it is pleaded, in addition to the former requisite of an affidavit of the truth of the plea, will render it essential for a practitioner to be very expeditious in his proceedings when any matter of defence arises pending the suit. However, under the concluding terms of the rule, and with analogy to prior decisions, when it may be just that effect should be given to any new ground of defence that has recently arisen, as in the case of bankruptcy and certificate pending an action, it is probable that further time, on due application, would be granted. (*x*) A plea of this nature, containing new matter, must necessarily conclude with a verification, and must be signed by counsel, and have the prescribed affidavit annexed, and be *delivered* as all other pleadings in the ordinary course of an action. In all respects, where not expressly or impliedly affected by the above rule, it would seem that the prior rules and decisions relative to pleas puis darrein continuance will be still applicable. (*y*) The form of the plea of matter that has arisen *before* the issuing of jury process may be as suggested in the note. (*z*)

(*x*) *Willoughby* v. *Wilkins*, 2 Smith's R. 396; 1 Chitty on Pleading, 5th edit. 698.

(*y*) As to these see references *supra*.

(*z*) In the K. B. [*or* " C. P." *or* " Exchequer."]

Plea after last pleading in banc.

C. D. ats. A. B. } On the —— day of ——, in the year of our Lord 1835. And now at this day comes the said C. D., by his attorney aforesaid, and saith that the said A. B. ought not *further* to maintain his action against him the said C. D., because he saith that *after the pleading of the last pleading in this suit*, that is to say, after the said —— day of ——, 1835, on which the said plaintiff [*or* " defendant"] pleaded his said plea [*or* " replication" *or* " rejoinder, &c."] and before this day, and within eight days now last past, to wit, on the —— day of ——, A. D. 1835, [*here state the subject-matter of the plea*;] and this he the said C. D. is ready to verify. wherefore he prays judgment if the said A. B. ought *further* to maintain his action thereof against him, &c. [*Signature of Counsel.*]

Add an affidavit of the truth of the above plea, and that the matter thereof arose within eight days, as follows:—

Affidavit of truth of plea.

In the K. B. [*or* " C. P." *or* " Exchequer."] Between { A. B. Plaintiff, and C. D. Defendant.

C. D. of ——, butcher, the defendant in this cause, maketh oath and saith, that the plea hereunto annexed is true in substance and fact, and that the matter thereof arose within eight days now last past.

Sworn, &c. (Signed) C. D.

CHAP. XXII.
V. OF SPECIAL CASES FOR THE OPINION OF THE COURT.(a)

V. Immediately that all the pleadings have terminated in an *issue* or *issues*, the parties may, if they can agree upon *a statement of the facts*, obtain the decision of the Court in which the action is depending, under the excellent enactment in 3 & 4 W. 4, c. 42, sect. 25, without incurring the expense of a trial. That act enacts "that it shall be lawful for the parties in any "*action* or *information after issue joined*, by consent and *by* "*order of any of the judges* of the said superior Courts, to "state the facts of the case *in the form of a special case for* "*the opinion of the Court*, and to agree that a judgment shall "be entered for the plaintiff or defendant by confession, or of "nolle prosequi, immediately after the decision of the case, or "otherwise as the Court may think fit; and that judgment "shall be entered accordingly." This enactment is quite new, for before it a special case could only be stated *after a trial* at law, upon facts then proved, or by authority of a Court of equity;—a jurisdiction already partially considered.(b) Excepting indeed that sometimes the Court, upon argument of a special rule, would direct the facts to be stated in a special case, so as to be more distinctly before the Court; and in the meantime the rule nisi was enlarged. Before this enactment any arrangement or agreement between parties to a suit to obtain the decision of the Court, otherwise than by *due course of practice*, was considered irregular, and censurable.(c) And where an attorney, although without any corrupt or unworthy motive, prepared a *special case*, in order to obtain the opinion of the Court upon a will of the testator, and suggested facts which had no foundation, it was held that he was guilty of a contempt, and he was fined in 30*l.* for his offence.(d)

3 & 4 W. 4, c. 42, s. 25. Power to state a *Special Case* without proceeding to trial.

It will be observed that the above statute expressly requires that the *issue shall have been joined before a case can be stated;* and this because until then the parties have not formally agreed upon the *point* to be disputed between them.(e) When the parties have agreed upon the facts, so as to be certain that no dispute can arise upon the terms of the special case, *the order of a single judge at* chambers may be obtained as upon consent for the statement of the case, so as to secure the due performance by the plaintiff and defendant of the

(a) See in general 2 Arch. K. B., 4th ed. 540, &c.; and T. Chitty's Forms, 350 to 353; and the observations of Tindal, C. J. on this act, in *Gibbens* v. *Buisson*, 1 Bing. N. C. 291.

(b) *Ante*, vol. ii. 350, 351.

(c) 9 East, 381.

(d) *In re Elsam*, 3 Bar. & Cres. 597; 5 Dowl. & R. 389. Parties by agreement to try a question cannot try it under an inappropriate form of action, 9 East, 381.

(e) Jervis's Rules, 205, note (r).

terms according to the statute.(*f*) And then the case is to be prepared in substance the same as heretofore after a trial; and unless the particular language of the pleadings be important, a very concise statement of them will suffice,(*g*) and the agreed facts will constitute the most important parts of the instances. The case is then to be signed by counsel on each side; and the rest of the proceedings will be the same as on other special cases. Copies of the special case are to be delivered to each of the judges, the same as demurrer books, and the other proceedings are much the same as upon a demurrer.

There does not however appear to be any power in the above statute of turning the case into a special verdict, so as to carry the question into a Court of Error; and therefore in a case of great importance, or where either party acts as a trustee, or represents a public body, it may be advisable to proceed to trial even upon agreed facts, and then to agree to a special case, with liberty for either party to turn the case into a special verdict, so as to obtain the opinion of a Court of Error.(*h*)

(*f*) See form of order, T. Chitty's Forms, 350, 351, 352.

(*g*) *Id. ibid.*; and see form of such special cases in *Gibbens* v. *Buisson*, 1 Bing. N. C. 283; *Shepherd and others* v. *Keatley*, 1 Cr. M. & Ros. 117. But the *pleadings* may be very important, see observation of Alderson, B. *id.* 123.

(*h*) *Archb. of Canterbury* v. *Robertson*, 2 Dowl. 78.

CHAPTER XXIII.

OF DEMURRERS, AND RECENTLY IMPROVED PRACTICE RESPECTING THEM.

CHAP. XXIII. OF DEMURRERS.

I. *Of demurrer, in general, and when or not proper or advisable.*

WHEN a declaration, plea, replication, or subsequent pleading is defective *upon the face of it,* (or with reference to the *prior pleading* in the *same action,* as in the instance of a *departure,*) but never merely in respect of an *extrinsic fact* or objection, the opponent *may demur* (unless he be under such terms of pleading issuably as to preclude him from taking a mere technical objection.)(*a*) And here must be constantly kept in view the distinctions between those defects which consist in the non-observance of a rule of *practice* and those which are deviations from the *principles or rules of pleading;* the former are only *irregularities,* to be objected to on summons or motion, and only the latter can be objected to by *demurrer.* Thus we have seen that the rule Hil. T. 4 W. 4, reg. 1, prescribes that declarations and all pleadings shall be *intituled* of the day when they are in fact pleaded;(*b*) and that Reg. Gen. Mich. Term, 3 W. 4, reg. 15, orders that declarations shall have one of the commencements thereby prescribed;(*c*) and Reg. Gen. Hil. T. 4 W. 4, reg. 8, orders that neither declarations nor subsequent pleading shall repeat the *venue* in the body; and yet if a declaration or plea(*d*) have no date or title, or an improper date, or a declaration have an improper commencement, or improperly repeat the venue in the body,(*e*) neither of those defects can be objected to by *demurrer;* but after requiring the opponent to amend the objectionable part, the only proceeding is by summons by a judge to compel the amendment, or to set aside the proceeding for *irregularity.*

However obnoxious to suitors, all technical objections that occasion increased trouble, expense, and delay may be, it is es-

(*a*) *Ante,* 706, as to pleading issuably.

(*b*) *Ante,* 463, 464.

(*c*) *Marshall* v. *Thomas,* 3 Moore & Scott, 98; 9 Bing. 678.

(*d*) *Neal* v. *Richardson,* 2 Dowl. 89.

(*e*) *Fisher* v. *Snow,* 3 Dowl. 27; *Townsend* v. *Gurney, id.* 168.

sential that *demurrers*, not only on account of *substantial* but even of mere *technical defects*, should be tolerated and given effect to; because if the latter were overlooked pleadings would soon be in a *state of confusion* and *uncertainty*, and it would be scarcely possible to know what ground of action or what defence the party pleading has intended to state. On this ground the Courts have sometimes even ordered a plaintiff to amend his *inartificial pleading* at his own expense, although at the same time they have pronounced that the defect was not demurrable. (*f*) The principal statute for the amendment of the law, 4 Ann. c. 16, sect. 1, at the same time that it aids most technical objections, unless they be *specially assigned as causes of demurrer*, advert to numerous technical defects that continue to be grounds of special demurrer, if so particularly pointed out.

When the facts of a case are as advantageously pleaded as they would be proved on a trial, then, supposing that they do not disclose a sufficient ground of action, it may be advisable for the opponent to demur; because if a defendant admit such facts, but deny that the legal result is in favour of the plaintiff, then it is advisable to demur unless the defence be merely for time, because the argument and judgment would settle the substantial rights of the parties, without incurring the useless expense of a trial; and even in a court of equity, in that view, a demurrer is encouraged when it would bring the substantial question between the parties to a speedier conclusion; and on that account costs are not given in that Court to a party who has omitted to demur when he ought to have adopted that course. (*g*) On the other hand, however, as respects demurrers, Lord Coke advises a party never to rely upon a *point of law* when the *facts* are in his favour; and that therefore a party who knows that an issue joined on facts must be found in his favour, should never demur. (*h*) As an instance in favour of a demurrer, we will suppose a declaration on a contract relating to a sale of land or against a guarantee, and that the defendant has *pleaded* that there was no sufficient signed written contract, the plaintiff should reply, stating there was a sufficient contract as required by the statute, and *then set out such contract verbatim* in his replication. In this case the best course for all parties will be to demur, upon which the legal

(*f*) 1 Bos. & Pul. 366

(*g*) *Jones* v. *Davids*, 4 Russell, 277.

(*h*) See the observations of Tindal, C. J. in *Bramah* v. *Roberts*, 1 Bing. N. C. 483, referring to Lord Coke's observations in *Butler* v. *Baker's case*, 3 Coke, 25.

sufficiency of the contract may be fully discussed and determined without incurring the expense of a useless trial upon facts not disputed. (*i*)

Sometimes, as where if an objection to pleading on the part of a defendant be suffered to pass unnoticed, he would gain some important advantage on the trial, or the *plaintiff* be otherwise prejudiced, it may be essential that the plaintiff should require him to amend, and if he decline, then a demurrer may be indispensable; but in general, as a demurrer operates in delay of a plaintiff, it is not advisable for *him* to demur; and sometimes pleadings have been drawn on the part of a defendant purposely to induce the plaintiff to demur, by which means the proceedings against the defendant have been suspended during the ensuing vacation. In general, therefore, when a plaintiff can safely take an *issue in fact* on the defendant's pleas, he should do so in preference to a demurrer.

It is principally on behalf of a *defendant* and for the mere purpose of delay that demurrers take place; and the practice has been for a defendant first to plead some intricate or new invented sham or false plea, requiring consideration and time to prepare a proper replication; and then, although there were no well founded objection to the replication, the course before the late rule was to demur, upon which some time was occupied in drawing the joinder and in endeavouring to obtain the judgment of the Court. It will be found that the recent rule relating to demurrers is particularly salutary for the prevention of delay, by compelling the party demurring to *point out in the margin of his demurrer some point* on which he intends to rely in support of his demurrer, and if such marginal point be omitted, or if the objection be frivolous, i. e. *manifestly untenable*, the Court or even a single judge may in term or *vacation* give leave to sign judgment as for want of a plea. (*k*) So that now if a defendant demur for delay and neglect to state any ground of demurrer in the margin, or state one that is insufficient, a plaintiff may, by leave of a judge, in vacation, immediately obtain judgment by default, a regulation which has in a great measure put an end to sham or unfounded demurrers merely for the purpose of delay; and where the party demurring has strictly complied with the rule, yet if the point raised

(*i*) *Hawes* v. *Armstrong*, 1 Bing. N. C. 761.

(*k*) From *Underhill* v. *Harvey*, 3 Dowl. 495, it seems that though a judge at chambers has refused to treat a demurrer as frivolous (as that a declaration at the suit of a surviving partner did not aver the death of the partner) a motion may afterwards be successfully made to the Court, though they gave leave to withdraw the demurrer.

be simple and not likely to occupy much of the time or consideration of the Court, they will, when the demurrer is late in the term, authorize it to be set down for argument even on the last day of term, and will not permit the defendant to withdraw his demurrer and plead the general issue, when it would be too late for the plaintiff to try at the sittings after term. (*l*)

CHAP. XXIII. OF DEMURRERS.

II. *The recent rules respecting demurrers.*

It would be beyond the object of this work to enter into a full consideration of demurrers, which involve a knowledge of the whole science of pleading as well in substance as in form. We shall here only notice in regular order the recent inprovements in the *practice* relating to demurrers. These have been principally effected by the *pleading* rules of Hil. Term, 4 W. 4, reg. 14, prescribing a concise form of demurrer and joinder, and by the practice rules of Hil. Term, 4 W. 4, reg. 1, 2, 3, 4, 5, 6, & 7. (*m*)

(*l*) *Wilson* v. *Tucker*, 3 Tyr. 938; 2 Dowl. 83.

(*m*) Reg. Gen. pleading Hil. Term, 4 W. 4, reg. 14, orders that "*The form of a* "*demurrer shall be as follows:*— Concise form of a *general* demurrer prescribed.

"C. D. } In the ——
" ats. } On the —— day of ——, A. D. 1835.
"A. B. } The said defendant by —— his attorney [*or* 'in person, &c.' '*or* " plaintiff'] says that the declaration [*or* 'plea,' &c.] is not sufficient in law."

The *special causes* are usually thus introduced at the conclusion of the general demurrer:—

"And the defendant [*or* 'plaintiff'] according to the statute in such case made and "provided, states and shows to the Court here the following causes of demurrer to the "declaration [*or* 'first count of the declaration,' *or* 'plea,' &c.] that is to say, that "[*here state the particular causes and conclude thus:*] And also that the declaration "[*or* 'first count,' *or* 'plea,'] is in other respects uncertain, informal, and insuffi- "cient," &c. Form of *special demurrer*.

The form of a joinder in demurrer shall be as follows:—

"A. B. } In the ——
" ats. } On the —— day of ——, A. D. 1835.
"C. D. } The said plaintiff [*or* 'defendant'] says that the declaration [*or* 'plea,' "&c.] is sufficient in law." Prescribed form of joinder in demurrer.

The practice rules, Reg. Gen. Hil. Term, 4 W. 4, order as follows:—

1. No demurrer nor any pleading subsequent to the declaration shall in any case be filed with any officer of the Court, but the same shall always be *delivered* between the parties. Demurrers, &c. to be *delivered*.

2. In the margin of *every* demurrer, before it is signed by counsel, *some* matter of law intended to be argued shall be stated, and if *any* demurrer shall be delivered without such statement, or with a *frivolous* statement, it may be set aside as irregular by the Court or a judge, and leave may be given to sign judgment as for want of a plea. Provided that the party demurring may at the time of the argument insist upon any further matters of law of which notice shall have been given to the Court in the usual way. In margin of demurrer a tenable objection to be stated before signed by counsel. But on argument other points may be urged.

3. No rule for joinder in demurrer shall be required, but the party demurring may demand a joinder in demurrer, and the opposite party shall be bound within four days after such demand to deliver the same, otherwise judgment. No rule to join in demurrer requisite.

CHAP. XXIII. I. OF DEMURRERS.

III. Summary of the recent improvements in the practice relating to demurrers, &c.

The *recent improvements* in the practice relative to demurrers may be thus enumerated:

1st. A demurrer is to be intituled as all other pleadings of the *very day* on which it is pleaded, i. e. delivered.

2nd. It should be framed in the above concise form prescribed by the pleading rules of Hil. Term, 4 W. 4, reg. 14, thereby avoiding the great verbosity to be found in the previous forms. (*n*)

3rd. Every demurrer must, before it is signed by counsel, have stated, in the margin at least, one *arguable objection;* the expression in the rule is, that if the objection be omitted or be *frivolous,* then on application to the Court or a judge it may be set aside as irregular and leave given to sign judgment as for want of a plea. The term "*frivolous*" has been construed to mean *untenable,* and probably any point so questionable as to bear argument would be construed not to be frivolous; and where in an action at the suit of two plaintiffs the declaration inadvertently stated the defendant to be indebted to the *plaintiff,* (using the singular instead of the plural,) and the margin of the demurrer stated that to be ground of objection, the

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No signature of counsel to a joinder in demurrer.

4. To a joinder in demurrer no signature of a serjeant or other counsel shall be necessary, nor any fee allowed in respect thereof.

The issue or demurrer book not to be made up by officer of Court.

5. The issue or demurrer book shall on all occasions be made up by the suitor, his attorney, or agent, as the case may be, and not as heretofore by any officer of the Court.

No rule for a concilium; but demurrer, &c. to be set down for argument, and notice thereof given.

6. No motion or rule for a concilium shall be required, but demurrers, as well as all special cases and special verdicts, shall be set down for argument at the request of either party with the clerk of the rules in the King's Bench and Exchequer and a secondary in the Common Pleas, upon payment of a fee of one shilling, and notice thereof shall be given *forthwith* by such party to the opposite party.

Prescribing due delivery of demurrer books, special cases, and special verdicts to the judges.

7. *Four clear days before the day appointed for argument* the plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the Lord Chief Justice of the King's Bench, or Common Pleas, or Lord Chief Baron, as the case may be, and the senior judge of the Court in which the action is brought; and the defendants shall deliver copies to the other two judges of the Court next in seniority, and in default thereof by either party the other party may on the day following deliver such copies as ought to have been so delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the rules in the King's Bench and Exchequer, or the secondary in the Common Pleas, as the case may be, a sufficient sum to pay for such copies.

The concluding part of Reg. Gen. Hil. T. 2 W. 4, reg. 59, orders that "in all cases "when the *defendant demurs* to the plaintiff's declaration, replication, or other subse-"quent pleading, the defendant's attorney, or the defendant, if he plead in person, "shall be obliged to accept notice of executing a writ of inquiry *on the back of the "joinder in demurrer;* and in case the defendant pleads a plea in bar, or rejoinder, "&c. to which the *plaintiff demurs,* the defendant's attorney, or the defendant, if he "plead in person, shall be obliged to accept such notice of executing a writ of inquiry "on the back of such demurrer. (*)

(*) Jervis's Rules, 58, n. (*e*).

(*n*) *Ante,* 755, note (*m*).

Court refused a rule for setting aside such demurrer. (*o*) So where to a declaration *in debt* on a promissory note there was a demurrer, and the margin stated the objection to be that it did not appear that the note was for value received, the Court refused to set aside the demurrer as frivolous, it being considered an arguable point whether an action of debt is sustainable unless it appear that the note contains those words.(*p*) The point must also be so stated as to communicate the ground on which the objection is founded, and not be as general as a general demurrer itself is; and therefore if the marginal point of demurrer to a plea of justification or excuse of a libel be "that the matters disclosed in the plea contain *no justification* "*in law to the libel*," this is *too general;* but the Court discharged the rule for setting aside the demurrer, upon the plaintiff undertaking to amend the marginal note, the costs to be costs in the cause, and if the plaintiff did not comply, then the defendant to be at liberty to sign judgment. (*q*)

It is stated that a majority of the judges have recently considered, that although the rule in *words* includes *every* demurrer, yet it only extends to *general* demurrers, and not to *special* demurrers, where the cause or ground of objection is stated in the demurrer itself; at least that it suffices to refer in the margin of a special demurrer to the causes of the demurrer stated in the body of it. (*r*) And the rule requiring a marginal statement does not extend to a demurrer to any proceedings where the King is concerned. (*s*) And although when the marginal statement is improperly omitted, the opponent may apply to set it aside for irregularity, yet if he neglect to do so, the omission affords no objection on the *argument* of the demurrer on any point not stated in the margin. (*t*) Reg. Gen. Hil. T. 4 W. 4, reg. 9, contains a regulation affecting writs of error, requiring a written notice of some particular ground of error intended to be argued, and power for the Court or a judge, upon summons, to order execution to issue, if he think the objection frivolous; (*u*) and under that rule it was held, that where the Court had previously granted a rule nisi for arresting the judgment, and which rule was afterwards discharged without discussion, the same objections might be stated in the margin of the assignment of errors, and having been sanctioned in the

(*o*) *Tyndall* v. *Ulleshorne*, 3 Dowl. 2; *Kinnear* v. *Keane*, 3 Dowl. 154.

(*p*) *Creswell* v. *Crisp*, 2 Dowl. 635; *Lyons* v. *Cohen*, 3 Dowl. 243.

(*q*) *Ross* v. *Robeson*, 1 Gale, 102; 3 Dowl. 779.

(*r*) 2 Arch. K. B. 4th ed. 550, *sed quære*.

(*s*) *The King* v. *Wollett*, 3 Dowl. 694.

(*t*) *Lacey* v. *Umbers*, 3 Dowl. 732.

(*u*) *Robinson* v. *Day*, 2 Dowl. 501.

first instance with the approbation of the Court in granting the rule nisi, could not be deemed frivolous. (*x*)

If the defendant be under terms of *pleading issuably*, he should not demur *specially*, even to a double replication, without leave; (*y*) but which he would probably obtain in case the plaintiff should refuse to amend his replication on request. (*z*) When not under such terms, it may be advisable to assign specially even substantial objections. We have in a prior page suggested some objections to a demurrer on a mere technical ground. (*a*)

4. Every *demurrer*, whether general or special, must be *signed* by a serjeant or counsel. (*b*)

5. The Practical Reg. Gen. Hil. Term, 4 W. 4, reg. 1, directs that no demurrer shall be filed, but shall be *delivered*.

6. The Practical Reg. Gen. 4 W. 4, reg. 3, directs that there shall not be any rule to join in demurrer, but merely a demand; and after waiting four days, if the joinder be not delivered, the party who demurred may sign judgment.

7. The Pleading Reg. Gen. Hil. Term, reg. 14, we have seen, prescribes a very concise form of joinder in demurrer. If demurrer books be delivered by a plaintiff without a proper joinder, the Court will not hear the argument; and if the defendant appear by counsel to argue the demurrer, he will not be entitled to any costs. (*c*)

8. Reg. Gen. Hil. T. 4 W. 4, reg. 4, orders, that a joinder in demurrer need *not be signed*, nor shall any fee in respect of any such signature be allowed.

9. Reg. Gen. Hil. T. 2 W. 4, reg. 44, orders, that if a defendant, after craving oyer of a deed, omit to insert it at the head of his plea, the plaintiff, in making up the issue, or *demurrer book*, may insert it for him; but the costs of such insertion shall be in the discretion of the taxing officer. (*d*)

10. We have seen that the Reg. Gen. Hil. T. 2 W. 4, reg. 59, (*e*) enables a plaintiff to expedite the suit by *indorsing* on *his joinder* in demurrer a *notice of inquiry*, and when the plaintiff demurs, he is authorized to give notice of inquiry on the back of the demurrer book, so that in the event of judgment for the plaintiff on demurrer, the execution of the inquiry is greatly expedited. (*f*)

(*x*) *Gardner* v. *Williams*, 3 Dowl. 796.

(*y*) *Gisborne* v. *Wyatt*, 1 Gale, 35; 3 Dowl. 505, S. C.; *ante*, 706, 7.

(*z*) *Id. ibid.*

(*a*) *Ante*, vol. iii. 77, 78.

(*b*) Reg. Easter Term, 18 Car. 2, K.B.

(*c*) *Howorth* v. *Hubbersty*, 3 Dowl. 457.

(*d*) Jervis's Rules, 54, note (*t*).

(*e*) *Ante*, 756, in note.

(*f*) Jervis's Rules, 58, note (*i*)

11. The demurrer book is to be made up by the suitor, and not as heretofore, by any officer of the Court, Reg. Gen. Hil. T. 4 W. 4, reg. 5.

12. In making up the demurrer-book, all the pleadings upon which an issue *in fact* has been joined, or unnecessary to be stated as regards the demurrer, are to be omitted. (*g*)

13. The Reg. Easter T. 18 Car. 2, ordered, that the copies of the pleadings in the demurrer-books delivered to the judges shall state the names of the counsel who signed each pleading, as well on behalf of the plaintiff as of the defendant.

14. By Reg. Gen. Hil. T. 48 G. 3, in C. P., (*h*) the objections intended to be relied upon before the delivery of the demurrer books to the judges, are to be stated in the margin by the party demurring; and if each party intend to take objections to the pleadings of the other, each should take care that the points intended to be made *on both sides* be stated in the margin of all the four demurrer-books, (*i*) or at least each party should deliver a statement of his objections, and the day of argument should be set down on the outside of each book. (*k*) In King's Bench, Reg. Easter T. 2 Jac. 2, and Hil. T. 38 G. 3, require that the objections intended to be insisted upon be marked by the party demurring in the margin of the books he delivers, and he should on the same day leave a copy of such grounds of demurrer with the two judges to whom he does not deliver books. (*l*) It would considerably facilitate the progress of business and relieve the judges frequently from trouble, if the respective counsel would agree upon a statement of the objections intended to be argued on *both sides*, as in C. P., and even add references to the authorities proposed to be cited, and to deliver such statement signed by them with all the demurrer books. (*m*)

15. No motion or rule for a consilium is to be given as heretofore; but the party wishing to expedite the argument and determination of the demurrer, is, according to Reg. Gen. Hil. T. 4 W. 4, r. 6, to set down the demurrer for argument with

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(*g*) 4 Tyr. 311; *Jones* v. *Roberts*, 2 Dowl. 374; Reg. Hil. T. 1828, K. B.; 7 Bar. & Cres. 642; Reg. Hil. T. 8 & 9 G. 4, C. P.; 4 Bing. 519; 1 Moore & P. 401; Reg. Mich. T. 9 G. 4, Exchequer; Dax's Pr. 71.

(*h*) 1 Taunt. 203; *Clarke* v. *Davis*, 7 Taunt. 72.

(*i*) *Clarke* v. *Davis*, 7 Taunt. 72. In *Darling* v. *Gurney*, 2 Dowl. 104, it was considered that in the Exchequer, unless an objection to previous pleadings not demurred to be noticed in margin of demurrer-book, the defendant cannot avail himself of it in argument of the demurrer, unless it would be ground of error.

(*k*) Barnes, 164; Tidd, 739.

(*l*) *Appleton* v. *Binks*, 1 Smith, 361; Tidd, 728.

(*m*) See Chitty's Summary Practice, 144 to 148.

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the clerk of the rules in K. B. and Exchequer, or secondary in C. P., upon paying 1*s*., and he is forthwith to give notice thereof to the opposite party.

16. The Reg. Gen. Hil. T. 4 W. 4, reg. 7, contains explicit directions respecting the delivery of the copies of the demurrer-books to the judges four clear days before the day appointed for argument; and if one side neglect to deliver his demurrer-books to the judges, the other side should do so for him, and then he will be entitled to judgment, but otherwise the case will be struck out; (*n*) and a party seeking to make his opponent pay the costs of copies of demurrer-books, pursuant to the above-mentioned rule, must deliver them on the day after the time for his opponent's delivering of them expires, (*o*) and if he delay such delivery until the second day after, he will not be entitled to costs before argument, though he may have delivered all the copies in time for argument. (*o*) Before the rule Hil. T. 4 W. 4, it was held in the Court of Exchequer that it was too late to deliver paper books on Saturday evening for an argument on a Monday morning, and the case was therefore struck out and ordered to be put in the next paper. (*p*)

IV. PROCEEDINGS ON ARGUMENT. (*q*)

On argument, we have seen that unless the objection, even to prior pleadings, as well as the pleading demurred to, be stated in the margin of the *demurrer-book*, neither party will be permitted to avail himself of it, (*r*) at least there are express rules to that effect in K. B. and C. P., and the same practice prevails in the Exchequer, though if the defect be so substantial as to constitute ground of error, the Court will sometimes permit an amendment. (*r*) The rule requiring the margin of the *demurrer* to state an arguable objection, does not supersede the prior rule or practice requiring the demurrer-book to state all the objections on each side, which must be carefully observed. But it is not a sufficient objection to a demurrer being argued, that the point intended to be raised was not stated in the margin of the *demurrer*, for that rule only enables the opposite party to apply to set aside the demurrer. (*s*)

(*n*) *Abraham* v. *Cook*, 3 Dowl. 215; 9 Legal Observer, 237.

(*o*) *Fisher* v. *Snow*, 3 Dowl. 27.

(*p*) *Darker* v. *Darker*, 2 Dowl. 88; and see *Britten* v. *Britten*, 2 Dowl. 239.

(*q*) See suggested new arrangement in Exchequer as to two distinct lists, one for demurrer-books intended to be argued, and another of those not to be argued, *Harvey* v. *King*, 3 Dowl. 730.

(*r*) *Ante*, 756; *Darling* v. *Gurney*, 2 Dowl. 104.

(*s*) *Lacey* v. *Umbers*, 3 Dowl. 732.

V. OF WITHDRAWING DEMURRER, OR AMENDING UPON THE COURT'S INTIMATION.

In general, if the Court intimate that a party had better amend, but his counsel decline and persist in arguing the point, and the Court are about to give judgment against him, leave to amend will not afterwards be given, unless indeed on behalf of a defendant, when he produces a very distinct affidavit of a good defence on *the merits*; at the same time the Court *may*, and sometimes will, give leave to amend even after judgment.(*t*) And where a defendant, to a declaration on a bill, pleaded that to the knowledge of the holder, it was negociated by fraud, and the plaintiff replied that he had notice of the fraud, and that the bill was indorsed to him for a good consideration, without stating what in particular, the Court, after argument, having decided that the replication was sufficient, refused the defendant permission to withdraw his demurrer and rejoin, even on the terms of paying the amount of the bill into Court. (*u*) Hence in general, when counsel in support of a demurrer have a strong intimation that the judgment will probably be against him, it it most prudent not to endanger his client's interest by persisting in arguing the case; and if it be intimated that the pleadings demurred to cannot be sustained, the counsel retained to argue in support of them should pray leave to amend, if they be capable of amendment as regards the facts. (*x*) In a recent case, the Court allowed a defendant to amend his plea after judgment on demurrer, upon an affidavit that material facts had come to his knowledge after such judgment, though it was insisted that it was always incumbent on a party to apply to amend it at the time of argument and before judgment. (*y*)

Where a defendant pleaded a frivolous demurrer so late in the term that there was not sufficient time to set it down for argument, and a motion was made to set it aside, the Court would only let the defendant in to plead on an affidavit of merits, and paying the costs of the demurrer and of the application. (*z*) And in another case, where a demurrer was frivolous, and a motion was made to set it aside, the Court granted a rule for that purpose to be absolute, unless cause was shown *on a particular* day. (*a*) When a rule of that nature is granted, it should be drawn up on reading the pleadings. (*b*) In a re-

(*t*) Per Tindal, C. J. in *Bramah* v. *Roberts*, 1 Bing. N. C. 483.

(*u*) *Id. ibid.*

(*x*) In cases of this nature, the principal attorney should attend the Court at the time a demurrer is likely to be brought on for argument, so as to be in communication with his counsel, when it may become necessary to act upon a doubtful course of proceeding.

(*y*) *Atkinson* v. *Baynham*, 1 Bing. N. C. 740.

(*z*) *Underhill* v. *Hurney*, 3 Dowl. 495.

(*a*) *Kinnear* v. *Keane*, 3 Dowl. 154.

(*b*) *Howorth* v. *Hubbersty*, 3 Dowl. 455.

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cent case in the Exchequer, that Court intimated the intention to introduce a new rule in that Court, and that in future there should be two lists of demurrers, viz. one of those intended to be argued, and the other of those not to be argued; and that with regard to the latter, the necessity for delivering paper books should not apply, and by which expedient the useless expense of delivering four demurrer books would be saved, except when the case is really to be argued. (c)

VI. OF COSTS OF DEMURRER, &c.

17. The 3 & 4 W. 4, c. 42, sect. 34, enacts, "that where "judgment shall be given either for or against a plaintiff or "demandant, or for or against a defendant or tenant, upon "*any demurrer joined*, in any action whatever, *the party in* "*whose favour such judgment shall be given, shall also have* "*judgment to recover his costs in that behalf.*" This very general and comprehensive enactment prevents the recurrence of many previous doubts and difficulties, (d) and constitutes a strong inducement for a defendant to demur when his ground is quite secure, and even for a plaintiff to demur to a plea when he is advised that the decision must be in his favour.

(c) *Harvey* v. *King*, 3 Dowl. 730.
(d) *Micklam* v. *Bale*, 8 Bar. & Cres. 642; *Forbes* v. *Gregory*, 1 Dowl. 679.

CHAPTER XXIV.

OF THE ISSUE AND NOTICE OF TRIAL.

CHAP. XXIV. ISSUE AND NOTICE OF TRIAL.

General observations relative to an issue.

NOTWITHSTANDING each party to an action has delivered to his opponent fair and complete copies of his pleadings, so that the plaintiff and defendant must be in possession of all that has been pleaded on each side, yet by the long established practice of the Courts, before either can proceed to trial there must be *made up and delivered* to the opponent an entire copy of all the pleadings in consecutive order, called *The Issue;* and, moreover, a copy of such issue, or an incipitur thereof, must be *entered on* what is termed an *issue roll,* before the record of nisi prius can be signed, sealed, or passed by the proper officer of the Court, and, consequently, before any cause can be tried; proceedings, more especially when the pleadings are lengthy, that considerably increase the expense of an action, and in that view might be spared.(a) The rule of Mich. Term, 5 Ann. recites that such entries of the issues had been neglected by attornies, to *the great damage and loss of their clients;* but the rules of Mich. T. A. D. 1654, Easter T. 5 W. & M. and Hil. T. 11 G. 1, in C. P. more candidly assign another reason, viz. that the neglect of attornies to enter the issues "*greatly defrauded the officers of the Court of their just and due fees.*"

(a) Reg. Mich. T. 5 Ann. K. B.; Reg. Easter T. 5 W. & M. C. P.

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It is obvious that a distinct *record* of *nisi prius*, stating all the pleadings, is indispensable, so that the judge and jury may see upon the face of a duly authenticated document what is the question to be tried; and perhaps it may be desirable, (except as regards expense,) that an *issue*, containing all the pleadings, should be delivered by the party about to try the cause to his opponent, so that the exact state of the pleadings to be tried may be certain; or that if there be any variance or other imperfection in such supposed copy of the pleadings, the latter may forthwith be returned and amended; and it may also be convenient that, to prevent future disputes, an exact copy of such issue be entered and kept by a public officer; so that the loss of any part of the previously detached pleadings may not, after the issue has been accepted and retained, constitute any ground of discussion. The issue, however, is so far mere matter of form, that a notice of trial may be delivered by a plaintiff with a *replication*, or other subsequent pleading concluding to the country, even *before the issue has been formally joined*.(*b*)

Who to make up the issue.

The general practice rules of Hil. T. 4 W. 4, reg. 5, orders that "the issue or demurrer book shall on all occasions be "made up by the suitor, his attorney or agent, and not, as "heretofore, by any officer of the Court;" which rule assimilates the practice of K. B. to that in C. P., and saves the great expense, when the clerk of the papers in K. B. received 8*d.* per folio of seventy-two words each for the whole paper book, and 4*d.* per folio for all pleadings subsequent to the declaration.(*c*) The issue is, in general prepared by the *plaintiff's attorney;* but when the *defendant* is desirous of expediting the suit (as very generally occurs in actions of replevin) his attorney may make up the issue.(*d*)

Time of making up and delivering the issue.

As the *issue* is a transcript of *all* the pleadings, concluding with an affirmative and negative, or *e converso*, it will follow that in general the issue should not be made up until after it is certain that *all* the pleadings have already stated an affirmative and negative. But in order to expedite proceedings on the behalf of a plaintiff a modern rule enables a plaintiff to expedite the trial, and to make up and deliver the issue even before the defendant has himself joined in any issue; for the effect of Reg. Gen. Hil. T. 2 W. 4, r. 108, is, that if the defendant's

(*b*) Reg. Gen. Hil. T. 2 W. 4, reg. 59; Jervis's Rules, 57, 58, note (*i*).

(*c*) Jervis's Rules, 87, note (*d*).

(*d*) Tidd, 9th ed. 734.

pleadings conclude to the country the *plaintiff may immediately* make up the issue, adding the similiter; or if the defendant's pleadings conclude with a verification, and the plaintiff intend to traverse them, concluding his replication or surrejoinder to the country, he may, instead of delivering his *pleading* to the defendant's attorney, at once make up the issue, entering his replication or surrejoinder in it, and adding the similiter; and the same if some of the defendant's pleadings conclude to the country, and some with a verification;(e) but this is a privilege confined to *plaintiffs*; for a *defendant*, after a pleading of his concluding to the country, cannot thus add a similiter *for the plaintiff*, but must rule him to reply or surrejoin, &c. and proceed to *non pros* the plaintiff; and in no case can a defendant deliver the issue, unless on the part of the plaintiff an issue has been actually joined, or his similiter been by him delivered. The right of a plaintiff to serve a notice of trial immediately after or at the time he delivers his replication, under the Reg. Gen. Hil. Term, 2 W. 4, reg. 59, will be presently considered.

The form of an issue.(f)

Before the 11 G. 4 & 1 W. 4, c. 70, (so materially affecting the distinction between terms and vacations,) and the uniformity of process act, 2 W. 4, c. 39, the forms of issues varied according to the process with which the action had been commenced; but since the process in *personal actions* has been so much simplified, a new general comprehensive form of issue became essential; and, to save trouble and prevent mistakes, the judges, by Reg. Gen. Hil. T. 4 W. 4, in schedule, prescribed several forms; viz. 1st, of an *issue* to be tried before one of the judges; 2ndly, of a nisi prius record; 3dly, of a judgment for the plaintiff in assumpsit; 4thly, of an issue to be tried before a sheriff or judge of an inferior court of record, where the action is for debt not exceeding 20*l.*; 5thly, of a writ of trial before a sheriff or such judge; 6thly, of an indorsement of a verdict on the latter; 7thly, of an indorsement of a nonsuit on the same; and 8thly, the form of a judgment for the plaintiff after trial before the sheriff. And the same rule in a schedule enjoins that "*issues*, "judgments, and other proceedings in actions *commenced* by "process under 2 W. 4, c. 39, shall be in the several forms in "the schedule hereunto annexed, or to the like effect mutatis "mutandis; provided, that in case of non-compliance, the "Court *or a judge* may give leave to amend." The prescribed

(e) 1 Arch. C. P. [83.]
(f) As to requisites of an issue before the recent rule, see *Dickinson* v. *Reynolds*, 2 Cromp. & Mees. 474.

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form of issue is stated in the subscribed note; (g) but it is necessary to add a few other directions and observations.

Observations on such form.

If, since this rule came into operation, the issue be delivered in the old form, *i. e.* in the Exchequer, stating the plaintiff to be debtor to the king, the proper course is to return such issue to the party who delivered it, with a request that he correct it; and if he refuse, then the Court will grant a rule nisi for setting it aside for irregularity. (h) It will be observed that the prescribed form of issue, in the first place, requires the name of the Court to be stated at the top, and also the date of the declaration; and if the latter be omitted, a rule nisi for setting aside the issue, and notice of trial indorsed thereon, may be obtained. (i) No memorandum is in any case to be introduced as heretofore; (k) indeed it seems, from the language of the prescribed form, to have been intended that an issue shall commence with a copy of the declaration verbatim (as heretofore was the form of an issue in C. P.); but with this very important addition, that after stating that the defendant has been summoned or arrested to answer the plaintiff, it is essential in an issue to state the date of the first writ, so as to show on the face of the issue the exact time when the action was commenced; and which will afterwards be copied verbatim into the record of nisi prius, and thus avoid all doubt or discussion on the trial at what time the action was commenced; and this is effected by the statement, that the defendant was summoned [*or* "arrested"] "by virtue of a writ issued on the —— day of ——, A. D. 1835, out of the Court, &c." If on the trial it should appear in evidence that the cause of action arose after such date of the writ, the objection would now con-

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Form of an issue in the King's Bench, Common Pleas, or Exchequer.

(g) In the King's Bench, [*or* "Common Pleas," *or* "Exchequer."]

The —— day of ——, in the year of our Lord 1835.*

[*Venue.*] A. B., by E. F. his attorney, [*or* "in his own proper person," *or* "by E. F., who is admitted by the Court here to prosecute for the said A. B., who is an infant within the age of twenty-one years, as the next friend of the said A. B.," *as the case may be*] complains of C. D., who has been summoned to answer the said A. B. [*or* "arrested" *or* "detained in custody,"] by virtue [*or* "served with a copy," *as the case may be,*] of a writ issued on the —— day of ——, in the year of our Lord 18—, [*N. B. To be the date of the first writ in the action,*] out of the Court of our lord the king before the king himself at Westminster [*or* "out of the Court of our lord the king before his justices at Westminster," *or* "out of the Court of our lord the king before the barons of his Exchequer at Westminster," *as the case may be;*] for that [*copy the declaration from these words to the end, and the plea and subsequent pleadings to the joinder of issue*] thereupon the sheriff is commanded that he cause to come here on the —— day of ——, twelve, &c., by whom, &c., and who neither, &c., to recognise, &c., because as well, &c.

* This is always to be the date of the declaration.

(h) *Hart* v. *Dally*, 2 Dowl. 257.

(i) *Ball* v. *Hamlet*, 3 Dowl. 188.

(k) *Hart* v. *Dally*, 2 Dowl. 257.

stitute a ground of nonsuit.(l) But where the record in an action for slander stated that the writ issued on the 4th of June, and that the words were uttered on the 27th of June, it was held that this discrepancy in the record, *after verdict*, was no ground for arresting the judgment; because the day laid in the declaration was not material; and after verdict it must be presumed, that on the trial the evidence was of slanderous words, used before the date of the writ.(m) It has been decided not to be necessary to state the form of action named in the writ, as whether it was "on promises," or "in debt," &c.;(n) and as after pleading to a declaration it would be too late to object that it varied from the form of action stated in the writ, it seems to follow that even if such variance appear on the face of the issue or record it would constitute no available objection.

The prescribed form imports that all the several pleadings shall be faithfully copied to the *end* of the joinder of issue; and as the *title* of the date of a plea, replication, &c., constitutes part of each, it should seem that the date of each should appear upon the face of the issue, and afterwards of the record; and where there has been a special plea or replication signed by counsel, the Reg. Easter T. 18 Car. 2, in K. B., directs that the names of such counsel shall, in all copies of the pleadings, be written under the same; and each part of pleading should in the issue commence a fresh paragraph.(o) If the plaintiff has mislaid any part of the pleadings, he may, after a civil application to the defendant, and his refusal, upon summons, compel him to give him a copy of any pleading in his possession, so as to enable him to make up the issue accurately.(p)

Reg. Gen. Hil. T. 2 W. 4, r. 44, orders, "that if a defend-"ant, after craving *oyer* of a deed, omit to insert it at the head "of his plea, *the plaintiff, on making up the issue* or demurrer-"book, may, if he think fit, *insert it* for him; but the costs of "such insertion are to be in the discretion of the taxing offi-"cer;"(q) so that it will be imprudent to set forth the bond or deed in an issue unless the pleader be confident that some advantage to the plaintiff will ensue.

As the necessity for any entry or statement of any *impar-*

(l) *Ante*, vol. iii. 204, 205.
(m) *Steward* v. *Layton*, 3 Dowl. 430.
(n) *Ball* v. *Hamlet*, 3 Dowl. 188; and see *ante*, 467 to 470.
(o) *Aaron* v. *Chaundry*, 2 Bar. & Cres. 562; 4 Dowl. & R. 41, S. C.
(p) *Dunsley* v. *Westbrown*, 1 Strange, 414.
(q) Jervis's Rules, 54, note (t).

lance or *continuance* from one term to another on a separate roll, or otherwise, has been expressly abolished,(r) and such entry has been prohibited by a subsequent rule, (s) and imparlances we have seen are in effect virtually abolished, (t) issues do not now, as heretofore, contain any statement of what has occurred between the different successive pleadings; excepting that when it may be necessary or advisable to state a death, or change of attorney, or other event that has occurred pending the action, it may be introduced by way of concise suggestion in the manner before noticed.(u) Thus the statute 8 & 9 W. 3, c. 11, sect. 7, enacts, that if there be two or more plaintiffs or defendants, and one or more of them should *die*, if the cause of action shall survive to the surviving plaintiff, or against the surviving defendant, the writ or action shall not be thereby abated; *but such death being suggested on the record*, the action shall proceed. It seems that if such death occur *before* issue joined, it should be stated therein at the head of the pleading that first afterwards occurred; and if between issue and before trial, then the death should regularly be stated in the nisi prius record; or the judge might refuse to try the cause, on the ground that, for want of the suggestion, the witnesses would be dispunishable for perjury. (v) It has been supposed that the suggestion of death may be made *at any time* on the judgment roll; (x) but the safest course is to state the new occurrence at the earliest opportunity, and to give the opponent a copy of the statement, that he may have an opportunity of objecting to it, if he have any ground.(y) So whenever it may be advisable in a *local action* under 3 & 4 W. 4, c. 42, sect. 22, or otherwise, to try the action in another county, a judge may grant permission to enter a suggestion upon the issue with a *nient dedire*, that it is proper to try in such county; and which suggestion is usually entered in the issue, immediately after the end of the pleadings and the award of venire.(z)

Great care must be observed, before the issue is delivered to the opponent, to examine the whole, to ascertain whether the pleadings are not only correct in themselves but also in relation to each other; viz. that *every part* of the declara-

(r) Reg. Gen. Hil. T. 2 W. 4, reg. 109.
(s) Reg. Gen. Hil. T. 4 W. 4, reg. 2.
(t) *Ante*, 706.
(u) See a form *suggested* in context, *ante*, 701; and Chitty on Pleading, 6th edit. Index, "*Suggestion.*"
(v) *Rex* v. *Cohen*, 1 Starkie's Rep. 511, cited in *Price* v. *James*, 2 Dowl. 435; and see a form of suggestion in record of nisi prius, Chitty's Col. Stat. 2, note (e).
(x) *Far* v. *Denn*, 1 Burr. 362.
(y) *Brocas* v. *London*, 1 Stra. 235.
(z) See 1 Arch. K. B. 4th ed. 259, 260.

tion is *covered* by the pleas, for if not, judgment by default *pro tanto* should be signed, and the venire awarded, as well to assess the damages as regards the part unanswered as to try the issues joined, for otherwise there may be a fatal discontinuance; and as to the *issues* care must be observed to see that they are *perfectly* joined; for although we have seen that an &c. after the words in a plea, that the defendant puts himself upon the country, *may* supply the want of a *similiter*, yet unless there be an express or implied *similiter*, the issue is not sufficiently joined; and if the record of nisi prius continue the defect, then the judge may refuse to try the cause.(*a*) Another consequence also follows, that if the defendant even inadvertently move for judgment as in the case of a nonsuit, on the erroneous ground that the plaintiff has not in due time tried the issues *joined*, and it appear that, from the want of a similiter, *no issue* has in strictness been joined, his rule will be discharged with costs. (*b*)

The term "*issue*" is the proper name for the copy of the pleadings, without regard to the number of counts, pleas, or allegations in the record; and therefore an indictment for perjury on the trial of "an issue" may suffice, although there be several pleas and distinct issues.(*c*) And Reg. Gen. Hil. T. 4 W. 4, reg. 16, orders that "no fees shall "be charged in respect of more than *one issue* by any officers "of the Court, or of any judge at the assizes, or any other "officer, in any action of *assumpsit*, or in any action of debt on "simple contract, or in any action on the case." And yet we have seen that, as regards costs, if a declaration contain several counts, and the general issue be pleaded to the whole, such plea creates as many issues as there are counts; so that the plaintiff must pay the costs of those on which he does not succeed, although they exceed the costs of the issues found for him.(*d*)

The prescribed form concludes with what has been termed the *award of the venire*, stating that the sheriff *is* commanded that he cause the jury to come on some day in Court to try the issue, though the issue is never delivered or shown to the sheriff, nor does he in practice receive any jury process till a subsequent time; so that the only apparent utility of this part of the form seems to be to denote the intention to proceed to

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(*a*) *Ante*, 768, n. (*v*), *Gilmore* v. *Melton*, 2 Dowl. 652; *Brown* v. *Kennedy*, *id.* 639.

(*b*) *Post*, 786, 787.

(*c*) 2 Stark. Rep. 521; but see Peake Rep. 37.

(*d*) *Cox* v. *Thomas*, 2 Crom. & Jerv. 498; *ante*, vol. iii. 476 to 479.

trial. When the venue is in a county palatine, instead of the award of the venire, a special award of a mittimus to the justices there concludes the issue.(*d*)

It is usual to *indorse* the *notice of trial* upon the back of the issue, and deliver the same together; but if the defendant have ruled the plaintiff to enter the issue, and the plaintiff do not wish immediately to proceed to trial, he may and should deliver the issue separately; and at any subsequent time, when ready or obliged to proceed to trial, then, to prevent judgment as in case of nonsuit, he may deliver the notice of trial on a separate paper.

Trial of issues before a sheriff, &c.

The statute 3 & 4 W. 4, c. 42, contains enactments, enabling the Courts or a judge to direct the trial of an issue for a debt not exceeding 20*l.*, and of suggestions of breaches in actions of debt under 8 & 9 W. 4, c. 11, sect. 8, before the sheriff or a judge of an inferior court of record; and the Reg. Gen. Hil. T. 4 W. 4, we have seen, prescribes forms relative to those proceedings; but it will be more convenient to consider them separately.

Of a defendant's examining and returning issue.(*e*)

It is advisable for a defendant's attorney immediately, or at least *within twenty-four hours* after an issue has been delivered to him, whether or not indorsed with a notice of trial, to examine the same, so as to ascertain whether it has been made up in the form prescribed by Reg. Gen. Hil. T. 4 W. 4, schedule, No. I.; stating the date of the writ, and particularly whether it faithfully sets forth every part of the previous pleadings, with names of counsel as originally delivered, or as amended by competent authority, and with the proper award of venire; for sometimes attempts are made on the part of a plaintiff to set forth the pleadings in an amended form, and more advantageously for him. If there be any variance, or any such attempt, or if any *suggestion* or other matter be stated without leave of a judge when necessary, it is incumbent on the defendant's attorney to return the issue as irregular and insufficient, within twenty-four hours, and with a notice of the particular objection; for otherwise he will not be at liberty to insist that there was an insufficient delivery of an issue, and may be bound to proceed to trial upon a record corresponding with the issue.(*f*)

(*d*) See 1 Arch. K. B. 4th ed. 259.

(*e*) See further, *post*, as to *notice of trial*; which it seems it is not essential for a defendant to return.

(*f*) *Ante*, vol. iii. 521, tit. *Issue and Paper Book.*

Of the defendant's ruling the plaintiff to *enter* the issue; and of entering the issue.(*g*)

We have seen that prescribed rules expressly require that the issue be *entered* on the proper issue roll, or an *incipitur thereof*, before the record of nisi prius shall be suffered to be signed, sealed, or entered for trial.(*h*) A defendant may still in K. B. and C. P. *rule the plaintiff to enter the issue* as in the forms in the note, and sign judgment of *non pros* if the rule be not complied with.(*i*) And before the Reg. Gen. Hil. T. 2 W. 4, reg. 70, it was in general essential that the defendant should, in K. B. and C. P., have ruled the plaintiff to enter the issue, and caused it to have been entered, before he could move for judgment as in case of a nonsuit. By that rule, however, it was ordered, that "no entry of the issue shall be "deemed *necessary* to entitle a defendant to move for judg-"ment as in case of a nonsuit, or to take the cause down to "trial by proviso;"(*k*) and in the *Exchequer* no rule to enter the issue was ever necessary to precede a motion for judgment as in case of a nonsuit;(*l*) and in that Court it seems to have been considered that there is no occasion *now* to enter the issue in any case, and that the Reg. Gen. Hil. T. 2 W. 4, reg. 70, makes no alteration in the time for moving for judgment as in case of a nonsuit, but the time remains exactly the same as it was before.(*m*)

As regards the *time* when a defendant *may* rule a plaintiff to enter the issue, it has long been "an axiom in practice, that a plaintiff cannot be compelled to take *two steps* in the same term;"(*n*) therefore a defendant could not rule the plaintiff to

(*g*) As to *docketing* an issue, see *Hopwood* v. *Watts*, 3 Nev. & Man. 146.

(*h*) *Ante*, 763.

(*i*) In the King's Bench.

Form of rule to enter the issue in K. B.

B. v. D. — the — day of — is given to the plaintiff to enter the issue.
Entered.

Entry of such rule.

B. v. D. — the — day of — is given to the plaintiff to enter the issue; otherwise let a non pros be entered.
By the Court.

In the Common Pleas.

Form of rule to enter the issue in C. P.

On the — day of —, A. D. 1835.

B. v. D. It is ordered, that unless the plaintiff, within four days next after notice of this rule to be given to his attorney or agent, shall cause the issue joined between the said parties in — term last past, to be entered upon record of the same term, a non pros may be signed.
By the Court.

At the defendant's request.

(*k*) Jervis's Rules, 61, note (*t*). This rule will diminish the frequency of rules to enter the issue, but not abolish them.

(*l*) *Coalsworth* v. *Martin*, 2 Tyr. 16; 2 Crom. & J. 123; 3 Dowl. 184, note (*a*).

(*m*) *Williams* v. *Edwards*, 3 Dowl. 183, 184.

(*n*) *Per* Lord Ellenborough, K. B. in Mich. T. A. D. 1816.

reply, and also in the same term rule him to enter the issue; nor indeed can a defendant in a town cause in C. P. in any case, or in K. B., unless notice of trial has been given, rule the plaintiff to enter the issue the same term it has been joined.(o) And in a country cause, in neither Court could a rule to enter the issue be given till the term after that in which issue was joined.(o) But in the Exchequer, Reg. Easter T. 15 G. 2, directs the plaintiff to enter the issue *when required* by the defendant.(p) The recent alterations in the terms and vacations do not appear to have affected the prior general rule of practice, that the plaintiff cannot be compelled to take two steps in a term.

Time within which plaintiff, when ruled, must enter the issue.

The plaintiff, when so ruled, must, in a town cause, enter the issue and bring the record into the office within four days exclusive after notice of the rule; and in a country cause, before the continuance day, or judgment of *non pros* may be signed by the defendant.(q) But the plaintiff may, on summons, obtain further time.(r) And if no judgment of non pros has been signed the issue may be entered at any time.(s)

Of the plaintiff's *entering* the issue.(t)

Whether the plaintiff has or not been *ruled* to enter the issue, he must, before he can *pass* his *nisi prius record*, enter the issue itself,(u) or, as is most usual, an incipitur only, in the subscribed form,(u) on the roll, before the time of passing such record, for otherwise the record, according to ancient rules, is not to be passed or sealed at the nisi prius office.(x) The

(o) Reg. Mich. 4 Ann. K. B. Tidd, 727, 764; 6 T. R. 218.

(p) Price's Pr. 271; Man. Ex. 320; Tidd, 727.

(q) Tidd, 727.

(r) Imp. K. B. 370; Imp. C. P. 363.

(s) 1 T. R. 16; Tidd, 728.

(t) See the practical proceedings, 1 Arch. K. B. 4th ed. 265, 304.

Form of entry of issue.

(u) In the K. B. [*or* "C. P." *or* "Exchequer."]

On the —— day of ——— A.D. 1835.

[*N. B. Always the date of the declaration.*]

[*Venue*] (to wit). A. B. by G. H. his attorney complains of C. D. who was summoned, &c. [*Copy the whole issue to the end of the award of the venire.*]

Form of an incipitur only of the issue on the roll.

In the K. B. [*or* "C. P." *or* "Exchequer."]

On the —— day of ——— A. D. 1835.

[*N. B. The date of the declaration.*

[*Venue*] (to wit). A.B. by G.H. his attorney complains of C.D. who was summoned to answer the said A. B. by virtue of a writ of summons issued on the —— day of ——, in the year of our Lord ——, out of the Court of our Lord the King before the King himself at Westminster. For that, &c. [*or otherwise, copying the commencement of the issue till the words 'for that,' &c.*]

(x) Reg. Mich. T. 5 Ann. reg. 1; *ante*, Reg. Easter T. 5 W. & M. C. P. 1 Arch. K. B. 4th edit. 264, 304, note (t).

Reg. Gen. Hil. T. 4 W. 4, reg. 15, orders that "the *entry* of "proceeding *on the record for trial*, or on the judgment roll, "(according to the nature of the case,) shall be taken to be, "and shall be in fact, the *first* entry of the proceedings in the "cause, or of any part thereof, upon record; and no fees shall "be payable in respect of any prior entry made or supposed "to be made on any roll or record whatever."(*y*) But it has been observed that this rule does not alter the practice as to the entering the *Issue*, which is to be deemed an entry of proceedings on the record for trial within the meaning of this rule. (*z*)

Of notice of trial, and when requisite.

We have seen that, in order to expedite his action, the plaintiff may in some cases give *notice of trial* even before issue has been actually joined. A notice of trial (which must always be in writing (*a*)) is considered so essential a proceeding that where a verdict was obtained in the absence of the defendant on account of *no* notice of trial having been given, the Court set aside such verdict, although the defendant had not in support of his rule nisi for that purpose ventured to swear that he had a good defence on the merits; and the Court said that as the plaintiff was irregular, no such affidavit was necessary, and the verdict, judgment, and execution were set aside; (*b*) and a notice of trial is necessary, though a special day has been duly appointed by the Court; (*c*) and although the defendant has compelled the plaintiff to give a peremptory undertaking to try, still a regular notice of trial must be given. (*d*)

Time of giving notice of trial, viz. how soon or how long delayed.

With respect to *the time of giving notice of trial*, as a general rule, a plaintiff's attorney should not serve it before he has ascertained that he is certain of being able to adduce *all the evidence* necessary to recover a verdict at the appointed time;

(*y*) Jervis's Rules, 104.
(*z*) 1 Arch. K. B. 4th edit. 264, 304, note (*t*).
(*a*) Reg. Mich. Term, 4 Ann. K. B. Cas. Pr. C. P. 3; Tidd, 753.
(*b*) *Williams* v. *Williams*, 2 Cromp. & M. 473; 2 Dowl. 350, S. C.
(*c*) Imp. K. B. 371, 374.
(*d*) Dax, Pr. 73, 74.

because if not so prepared, then the giving such notice would of itself enable a defendant sooner to move either for costs for not proceeding to trial, or for judgment as in case of a nonsuit, for not trying at the appointed time. It therefore results that at least as soon as the issue has been joined, the plaintiff's attorney should *first consider the evidence,* and *subpœna the witnesses,* and not until he is confident of their attendance should he serve the notice of trial. It would seem incongruous to serve a notice of trial before the *issue* has been *actually joined;* however, in order to expedite proceedings on the part of a plaintiff, Reg. Gen. Hil. T. 2 W. 4, reg. 59, orders that in all cases where the plaintiff in pleading concludes to the country, the plaintiff's attorney *may give notice of trial at the time of delivering his replication or other subsequent pleading;* and in case issue shall afterwards be joined, such notice shall be available; but if issue be not joined on such replication or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, *such notice shall operate from the time that notice of trial was given as aforesaid.* (e)

In general the notice of trial is *indorsed on the issue,* and consequently delivered therewith; but it may be given on a *separate paper;* (f) and the latter seems preferable when at the time of the delivery of the issue the plaintiff is not quite certain of being able immediately to try. The plaintiff's attorney must at all events give notice of trial in a town cause for the term next after that in which or in the vacation of which issue was *completely joined,* (g) and which suffices, although issue was joined sufficiently early in the previous term to have given notice of trial for the sittings after such term; (h) and in country causes, for the second assizes after issue joined, for otherwise the defendant may afterwards move for judgment as in case of a nonsuit; (i) and the same practice extends to trials before the sheriff. (k) But still, unless such judgment has been given, the plaintiff may at any time afterwards give notice of trial, subject to this qualification, that if he delay for four terms after issue joined, and the delay was not at the instance of the *defendant's* request, (l) then he must give *a term's notice;* and Reg. Gen.

(e) See Jervis's Rules, 57; Tidd, 578, 754, for the prior rules.

(f) Tidd, 754.

(g) When not so completely joined, see *Gilmore* v. *Melton,* 2 Dowl. 632; *Brown* v. *Kennedy, id.* 639; *Seabrook* v. *Cave, id.* 691.

(h) 2 T. R. 734; 4 T. R. 557; 1 Hen. Bl. 123; 2 Hen. Bl. 550; *Horwood* v. *Roberts,* 2 Dowl. 534.

(i) *Post* as to judgment as in case of nonsuit, and when it may be moved for, *Horwood* v. *Roberts,* 2 Dowl. 534.

(k) *Horwood* v. *Roberts,* 2 Dowl. 534.

(l) *Evans* v. *Davies,* 3 Dowl. 786.

Hil. T. 2 W. 4, reg. 52, orders that when a term's notice of trial or inquiry is required, such notice *may* be given at any time before the *first day* of term, which rule assimilates the practice of all the Courts in that respect. (*m*) Against *a prisoner*, Reg. Gen. Hil. T. 2 W, 4, reg. 85, orders that a plaintiff shall proceed to trial or final judgment within three terms inclusive after declaration, or the defendant shall be supersedable; but if the plaintiff give due notice and set his cause down for trial in the third term, and it be not tried in the third term, or at the sittings after, in consequence of the arrear of causes, and not attributable to the plaintiff's fault, the defendant will not be supersedable. (*n*)

Time to be given by notice of trial.

No material alteration as regards *the time* of notice of trial has been introduced by the new rules. The times of notice were fixed by concurrent rules in K. B. and C. P. of Mich. Term, in 1654, and in the Exchequer by rules of Easter T. 56 G. 3, and Easter Term, 57 G. 3, (*o*) and in all the Courts is the same, viz. if the venue be laid or the cause is to be *tried in London or Middlesex, and* the defendant (or one of several(*p*)) *reside* within *forty computed miles* of London, then *eight days' notice* suffices, exclusive of the day it was given and inclusive of the day of trial. (*q*) But if *all* the *defendants reside above forty computed miles from London* then *fourteen days'* notice must be given. The expressions in the rules are, "*residing*,' or "*dwelling*," or "*living*," and each means a *permanent residence* at the time of serving the notice and not a mere *temporary resorting* to a place; (*r*) and if a defendant be in Ireland or abroad he is entitled to the full fourteen days' notice; (*s*) and a defendant, who has removed to a place upwards of forty miles from London pending the action, but before notice of trial, is entitled to fourteen days at least, if he have given notice of his removal; (*t*) and if the residence be upwards of forty miles, the defendant will be entitled to a fourteen days' notice, though he happen to be in London at the time the notice is served. (*u*)

By Reg. Easter T. 51 G. 3, K. B., Reg. Hil. T. 32 G. 3, C. P. and Reg. Hil. T. 1 W. 4, Exchequer, it was provided, that

(*m*) 9 Bar. & Cres. 621; Price, Pr. 278; Tidd, 576, 577.
(*n*) *Myers* v. *Cooper*, 2 Dowl. 423.
(*o*) 4 Price, 4; Tidd, 755, 756.
(*p*) 4 T. R. 520.
(*q*) See the rules, and 2 Stra. 954, 1216.
(*r*) 1 East, 688; *Douglas* v. *Ray*, 4 T. R. 552; 2 Price, 279.
(*s*) *Id. ibid.*; 1 Arch. K. B. 265, 266.
(*t*) *Rochfort* v. *Robertson*, 12 East, 427; *Raine* v. *Hodgson*, 2 Price, 279.
(*u*) *Blaaw* v. *Chaters*, 6 Taunt, 458; 2 Marsh. 151, S. C.

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if the trial is to be in *London* at the *adjournment day*, it shall suffice to give eight days' notice before the first sitting day after the term, if the defendant reside upwards of forty miles, and four days, if the defendant reside within that distance. (*x*)

The statute 14 G. 2, c. 17, sect. 4, enacts that when an indictment, information, or *cause* shall be tried on either of the circuits elsewhere than in London or Middlesex, then in all cases, without regard to the residence of the defendants, at least *ten days' notice* of trial must be given; and this is construed to be exclusive of the day of service and inclusive of the last day. (*y*) In all cases of notice of trial, Sunday, Christmas-day, Good-Friday, or a day appointed for a public fast or thanksgiving, is a day, and to be included, unless it be the last; (*z*) and yet Sunday is not reckoned as one of the two days in a *continuance* of a notice of trial; and therefore notice of continuance, served on Saturday evening for Monday, was held insufficient; (*a*) and it should seem on principle that Saturday for Monday would be an insufficient short notice of trial, as in effect only allowing thirteen hours to prepare. (*a*) And we have seen that the days between the Thursday before Easter-day and the Wednesday after are to be reckoned in *notices of trial* and inquiry, (*b*) and therefore a notice of trial before the sheriff for Easter-Tuesday was holden good. (*c*)

Short notice of trial. (*d*)

We have seen that Reg. Gen. Hil. T. 2 W. 4, reg. 59, orders "that the expression 'short notice of trial' shall *in country* "*causes* be taken to mean four days;" (*e*) and one day is to be construed exclusive, the other inclusive; (*f*) and the Court said short notice of trial in country causes must mean four days *peremptorily*, whatever may be the state of the pleadings, so that if the defendant delay delivering his rejoinder, and thereby prevent the plaintiff from giving the full four days' notice, this cannot excuse shorter notice; for the plaintiff's attorney, when before the judge on the summons for time to plead, should have saved the assizes by stipulating that if the issue for trial was not raised in time to give the regular notice, then *two*

(*x*) 13 East, 593; Tidd, 755; Jervis's Rules, 16, 17.

(*y*) Tidd, 755, Price, Pr. 276.

(*z*) Tidd, 757; Imp. K. B. 373.

(*a*) *Wardle* v. *Ackland*, 2 Dowl. 28; 3 Tyr. 819; and see *Grojean* v. *Manning*, 2 Tyr. 725; 2 Cromp. & Jer. 635, S. C.

(*b*) *Ante*, vol. iii. p. 106; Reg. Easter T. 2 W. 4, Jervis's Rules, 75.

(*c*) *Charnock* v. *Smith*, 3 Dowl. 607, where see an explanation of Reg. Easter T. 2 W. 4.

(*d*) See *constructions, ante*, 709.

(*e*) Jervis's Rules, 57, note.

(*f*) *Ante*, 709. Reg. Hil. T. 2 W. 4, reg. 8.

days' notice should be sufficient. (g) And in another case, although Bayley B., on the motion for a new trial, said the rule may mean four days *if practicable*, and that if a defendant obtained time and prevented the plaintiff from giving four days, the defendant *might* dispense with the rule, yet afterwards the rule was made absolute, the whole Court considering that three days' notice was insufficient, although the defendant had occasioned the delay; and they also said that the four days must have expired on or before the commission day, and the delay in the trial for a few days after was immaterial. (h) But in a *town cause*, " taking short strict notice of trial" imports *two days' notice*, one exclusive and the other inclusive; (i) though it would seem on principle that Sunday ought not to be considered as one of the two days, for otherwise a short notice served on Saturday evening for Monday might suffice, though allowing in effect only a few hours. (k)

Form of notice of trial.

The notice must always be in *writing*. (l) It may be either *indorsed on the issue* at the time it is delivered, or may be given *separately on a distinct paper*, though when the plaintiff avails himself of Reg. Gen. Hil. Term, 2 W. 4, reg. 59, by giving notice of trial at the time he delivers his replication or surrejoinder concluding to the country, then of course, as the issue has not then been made up, the notice of trial *must* be on a separate paper. When the notice is on the back of the issue, it suffices in a *country cause to indorse*, " *Take notice of trial at the next assizes*;" because it then necessarily refers to the within issue, which shows the venue; and the time and place of trial will depend on the same, and must be as well known to the defendant as to the plaintiff; though if such words, without title of the cause, date, county, or attorney's name, had been written on a separate paper, it would have been insufficient. (m) But in a *town cause*, a notice, although *indorsed* on the issue, must be more particular, and specify whether the trial is to be at the first day of the sittings or on the adjournment day. (n) The safest course, whether the notice of trial be indorsed, or be

(g) *Lawson* v. *Robinson*, 3 Tyr. 491; Cromp. & M. 499; and see same principle, *King* v. *Jones*, Cromp. & M. 71.

(h) *Lawson* v. *Robinson*, 2 Dowl. 69.

(i) *Ante*, 709.

(k) *Grojean* v. *Manning*, 2 Tyr. 725; 2 Cromp. & Jer. 635, S. C.; *Wardle* v. *Ackland*, 2 Dowl. 28; 3 Tyr. 819, S. C., which although decisions on a *continuance* of notice of trial seem on principle to establish this position.

(l) *Ante*, 773; Reg. M. 4 Ann. c. .

(m) *Tyle* v. *Steventon*, 2 Bla. R. 1298; *Henbury* v. *Rose*, 2 Stra. 1237; Price's Prac. 276. This seems analogous to a notice in blank to plead *indorsed* on a declaration, *ante*, 499.

(n) MS. Mich. T. A. D. 1818; and Chitty's Summary Prac. 158.

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on a separate paper, is to adopt a *full form* in all cases; those in the notes are usual. (*o*) If the notice misdescribe the place of trial, as "at Guildhall, Westminster," since trials having ceased to take place there, it will be deemed insufficient, if the defendant swear positively that he was misled. (*p*) In general the notice is, that the *cause* (not the *issue*) will be tried; but when there is an issue in fact and one of law, or where one of several defendants has suffered judgment by default, the notice then is, that the *issue* or issues will be *tried* and the *damages assessed*. (*q*)

To whom notice of trial or countermand to be given or on whom served.

The Reg. Gen. Hil. T. 2 W. 4, reg. 57, orders that "notice "of trial and inquiry, and of continuance of inquiry, *shall be* "*given in town*, (*r*) but a *countermand* of notice of trial and "inquiry may be given either in town or country, unless other-"wise ordered by the Court or a judge." Which rule assimilates the practice as to the service of notice of inquiry and trial in C. P. to that in K. B. and Exchequer, (*s*) and continues the option of serving the notice of countermand in town or country as before in K. B. (*t*) But notice of trial at bar is to be given to the proper officer of the Court, before giving notice of trial to the party. (*u*)

The notice of trial is to be served on the defendant's attorney, either personally or at his residence, when the defendant has ap-

Notice of trial in *London* to be indorsed on issue or be on a separate paper.

(*o*) In the K. B., [*or* "C. P." *or* "Exchequer of Pleas."]

Between { A. B. Plaintiff, and C. D. Defendant.

Take notice of trial in *this cause* * for the sittings within [*or* "for the first day of the sittings after" *or* "for the adjournment day of the sittings after"] this present —— term, to be holden at the Guildhall of the city of London. Dated this —— day of ——, A. D. 1835.

Your's &c.

To Mr. I. K. defendant's attorney, [*or* "agent."]

G. H. plaintiff's attorney, [*or* "agent."]

The like in *Middlesex*.

[*Same as above to the asterisk*,] for the —— sittings within, [*or* "for the sittings after"] this present term, to be holden at Westminster Hall, in the county of Middlesex. Dated, &c. [*same as the above*.]

Notice of trial at the assizes.

[*The same as the first form to the asterisk, and then proceed as follows*,] for the next assizes to be holden at ——, in and for the county of ——. Dated this —— day of ——, A. D. 1835.

Your's, &c.

To Mr. I. K. defendant's attorney, [*or* "agent."]

G. H. plaintiff's attorney, [*or* "agent."]

[*See several other forms, Tidd's Forms*, 270, 271; *T. Chitty's Forms*, 126, 127.]

(*p*) *Cross* v. *Long*, 1 Dowl. 342.

(*q*) See the forms, Tidd's Forms, 270, 271; T. Chitty's Forms, 126, 127.

(*r*) i. e. to the agent in town, and not to the defendant's attorney in the country.

(*s*) Tidd, 576, 577, 753, 754; and see Jervis's Rules, 57.

(*t*) Tidd, 757.

(*u*) Reg. Gen. Hil. T. 2 W. 4, reg. 60.

peared by attorney, unless the residence of the attorney cannot be ascertained, in which case a copy should be served on the defendant himself, (v) and another copy addressed to the attorney stuck up in the office, and another copy left at his last known residence. If there be several defendants who have appeared by separate attornies, a notice must be served on each, and if several defendants have appeared in person, then also each must have notice.

Of *Continuing* or *Countermanding* notice of trial.

When a plaintiff who has given notice of trial afterwards discovers that he cannot obtain the requisite evidence, or be otherwise prepared to try on the appointed day, he may in a *town cause* either *continue* his notice to a subsequent sittings, or in a town or country cause he may *countermand* his notice of trial, and by the latter proceeding delay the time of trial indefinitely; for after a countermand, a fresh notice of trial must be given. (w) But as a continuance and countermand occasion trouble, delay, and expense, they should in general be avoided, by a plaintiff's attorney assuring himself, before he serves a notice of trial, that he will be ready to try by the appointed time.

Notice by Continuance.

In a town cause, if notice of trial has been given for a particular day, and the plaintiff find that he cannot be prepared to try on that day, he may, *two days* before it, give notice of trial by *continuance* for the next or other subsequent sitting in or after the term (x) in the subscribed form; (y) but the plaintiff cannot continue his notice of trial more than once in a term; (z) and in the Common Pleas but once in any case. (a) Nor can there be a countermand and continuance in the same

(v) Tidd, 753; 1 Arch. K.B. 4th ed. 268.

(w) Imp. K. B. 379.

(x) Tidd, 758; Imp. K. B. 280; Imp. C. P. 372.

Form of notice of trial by *Continuance*.

(y) In the K. B. [*or* " C. P." *or* " Exchequer."]

Between { A. B. Plaintiff, and C. D. Defendant.

I do hereby *continue* the notice of trial given you in this cause to the sitting after this present —— term. Dated this —— day of ——, A. D. 1835.

Your's, &c.

To Mr. I. K. defendant's attorney, &c. G. H. plaintiff's attorney.

(z) Tidd, 758; Sel. 411; Imp. K. B. 380; Dax's Prac. 75; Price's Prac. 276.

(a) Imp. C. P. 372.

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notice. (*b*) In C.P. notice of trial for the sitting after term cannot be continued to the first sitting in the next term, but in the K. B. it may. (*c*) If the defendant prevented the plaintiff from trying at one sitting, by entering a ne recipiatur, it was held that the plaintiff might proceed to trial at the next, upon giving notice by continuance before the rising of the Court at the first sitting. (*d*) Two days' notice are sufficient, the first exclusive the second inclusive; (*e*) but the intervening day must not be a Sunday, and therefore notice on Saturday evening for Monday morning is insufficient. (*f*) In *country causes* there is no notice of trial by continuance.

Of *Countermanding* notice of trial.

The Reg. Gen. Hil. Term, 2 W. 4, r. 61, orders, that "in "country causes, or where the defendant resides more than "forty miles from town, a *countermand* of notice of trial shall "be given *six days* before the time mentioned in the notice "for trial, unless short notice of trial has been given."

And reg. 62 orders, that "in *town causes*, where the de- "fendant lives within forty miles of town, *two days'* notice of "countermand shall be deemed sufficient." (*g*) The form of notice may be as subscribed. (*h*) It appears to have been supposed, that in a town cause a notice of countermand might be served on Saturday for Monday; (*i*) but as the principle of the decisions relative to the service of a notice of continuance on Saturday evening not being sufficient for Monday, because the defendant cannot properly take means on Sunday for preventing the attendance of his witnesses, seems here equally applicable, it would seem that Sunday ought not to be included in a notice of countermand. (*k*) A defendant's undertaking to accept

(*b*) Tidd, 758; Imp. K. B. 389; Imp. C. P. 371.
(*c*) Imp. K. B. 389; but see 1 Sel. 411.
(*d*) Tidd, 758.
(*e*) *Id. ibid.*
(*f*) *Grosjean* v. *Manning*, 2 Cromp. & Jerv. 635; 2 Tyrw. 725, S. C.; *Wardle* v. *Ackland*, 2 Dowl. 28; 3 Tyr. 819, S.C.
(*g*) See the previous and other practice, Tidd, 757; 14 Geo. 2, c. 17, sect. 5, which also required *six* days' notice in country causes, or where the defendant resided more than forty miles from London.

Form of notice of *countermand* of trial.

(*h*) In the ——.

Between { A. B. Plaintiff, and C. D. Defendant.

I do hereby *countermand* the notice of trial given you in this cause. Dated this —— day of ——, A. D. 1835.

Your's, &c.
To Mr. I. K. defendant's attorney. G. H. plaintiff's attorney.

(*i*) Barnes, 305; Pr. Reg. 395, S. C.; Tidd, 757.
(*k*) *Grosjean* v. *Manning*, 2 Cromp. & Jerv. 635; 2 Tyr. 725, S. C.; *Wardle* v. *Ackland*, 2 Dowl. 28; 3 Tyr. 819, S. C.

short notice of *trial* does not entitle the plaintiff to give less than the usual notice of *countermand.* (l) We have seen that Reg. Gen. Hil. T. 2 W. 4, reg. 57, orders that *countermand* of notice of trial or inquiry may be given either in town or country, unless otherwise ordered by the Court or a judge.

Fresh notice of trial, when necessary.

After countermand there must be a fresh notice of trial; (m) and if a cause be put off by rule of Court, there must then also be a new notice of trial: (n) so where a cause has been made a remanet at the *assizes;* (o) and even when a plaintiff has, at the instance of the defendant, given a peremptory undertaking to try at the next sittings or assizes, there must be a fresh notice. (p) But in a *town cause,* when it has been made a remanet, no new notice is necessary, as the defendant is then bound to continue his attendance till the cause has been tried. (q) And when a cause has been made a remanet to the next sitting, by an order of nisi prius, no fresh notice is requisite. (r)

If after a rule for a new trial has been made absolute, the party who succeeded on that rule suffer more than four terms to elapse without taking the case down to trial, *a term's notice of motion* is necessary to discharge the rule, as either party may try by proviso. And an order to change an attorney is not a proceeding in a cause dispensing with a term's notice of proceeding. (s)

Conduct of defendant's attorney when an insufficient issue or notice of trial, &c. has been served.

The safest conduct for the defendant's attorney to pursue, when an insufficient issue or notice of trial has been served, if he think fit to object at all, is to return the issue and notice, with a written intimation that it is insufficient, and in what respects. And in one case, that of an insufficient notice of inquiry, we have seen that the practice is imperative that the notice must be returned. (t) But as regards a defective *notice of trial,* and some *other proceedings,* however laudable the candour would be, yet it is not essential; (u) and in case of an insufficient notice of trial, it is not necessary to return the issue or notice, (x) and the defendant or his attorney may deliver a brief to counsel to attend in Court and watch the proceedings,

(l) *King* v. *Jones*, Cromp. & M. 71.
(m) Imp. K. B. 379; Tidd, 757.
(n) 8 T. R. 224; 1 Dowl. & R. 15.
(o) 6 Bar. & Cres. 125; 9 Dowl. & Ryl. 126; 4 Bing. 414; but see Tidd, 758, (*f*).
(p) 8 T. R. 245.
(q) *Id. ibid.;* 4 Bing. 415.
(r) 1 Dowl. & R. 15; Tidd, 757, 758.
(s) *Deacon* v. *Fuller*, 3 Tyr. 382.
(t) *Ante*, 530.
(u) See *Wardle* v. *Ackland*, 2 Dowl. 30.
(x) *Semble*, *Lawson* v. *Robinson*, 2 Dowl. 70, 71.

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and even take notes, without thereby waiving the irregularity; and he may nevertheless afterwards move to set aside the verdict for the irregularity in the notice. (y) But if the action be *defended*, and witnesses cross-examined, or the jury addressed at the trial, though after protest, the irregularity will be thereby waived, and the Court would afterwards refuse to set aside the verdict. (z)

III. Of motions for *Costs of the Day* for not proceeding to trial according to notice. (a)

III. If a plaintiff give notice of trial either in a town or country cause, and do not try or give notice of continuance or countermand before the appointed time, he may then, by motion to the Court, be compelled to *pay the costs of the day* which the defendant thereby sustained. This practice is in K. B. and C. P., founded on the rules of Mich. T. 1654, sect. xviii. in K. B., and sect. xxi. in C. P., which direct, "that in case of "such warning (i. e. notice of trial,) and no proceeding, the "defendant, upon motion, is to have his costs of his former "attendance, to be taxed by the prothonotary, unless the "plaintiff give the defendant warning, (i. e. *continuance* or "*countermand*,) in convenient time, that he would not proceed, "or show cause to be allowed by the Court in excuse of such "costs," (b) such as an accident happening to a material witness on his way to the trial. (c)

The 14 Geo. 2, c. 17, sect. 5, also enacts, that in case any party shall have given such notice of trial as aforesaid, (i. e. at least ten days' notice of trial at the assizes in London or Middlesex, where the defendant resides above forty miles from London, as mentioned in section 4, and shall not afterwards *duly countermand* the same in writing at least six days before such intended trial, every such party shall be obliged to pay unto the party to whom such notice of trial shall have been given as aforesaid, the like costs and charges as if such notice of trial had not been countermanded. Early proceedings for these costs (which are sometimes considerable, upwards of 11*l*.) (d) are in general advisable. Before the recent rule of Hil. T. 2 W. 4, reg. 69, in the Court of K. B. and Exchequer, the defendant might first move the Court for the costs of the day, and immediately afterwards move for judgment as in case

(y) Per Curiam, in *Grosjean* v. *Manning*, 2 Tyr. 726; 2 Cromp. & Jerv. 635.

(z) *Doe* v. *Jepson*, 3 Bar. & Adol. 402; *Fraas* v. *Paravaini*, 4 Taunt. 545; *Gillingham* v. *Waskett*, M'Clel. Rep.

(a) See the full practice, Tidd, 758 to 760; 2 Arch. K. B. 4th ed. 907 to 909; 1 Arch. C. P. 53, 248, 249, 253.

(b) Tidd, 9th ed. 758.

(c) Barnes, 133; 5 Taunt. 86.

(d) See Bills of Costs, page 76 to 78.

of a nonsuit in respect of the *same default*, for which he had moved for the costs of the day; but in the Common Pleas such double proceeding in respect of the *same* default was not permitted, (e) and now by that rule, in all the Courts, if the defendant move for the costs of the day he cannot, in respect of the *same default* in trying, move for judgment as in case of a nonsuit, but must wait until there has been *another default* in trying; and therefore since that rule, when the defendant is anxious to press the plaintiff to trial, the usual course is to forbear any distinct motion for costs in the first instance, and to move for judgment as in case of a nonsuit, and thereupon compel the plaintiff to give a peremptory undertaking; and upon discharging the rule, or subsequently, the Court will, on motion, order the payment of the costs of the day. (*f*) And now all the Courts, in discharging the rule for judgment as in case of a nonsuit, will in general grant the costs of the day as a part of their rule, without requiring a separate rule for that purpose; (*g*) but not if they make the rule absolute, because then the costs of the day would be included in the general costs; (*h*) or if the Court, in discharging the rule for judgment, say nothing respecting the costs of the day, the defendant may afterwards make a separate application for such costs, (*i*) and a term's notice is not necessary previously to moving. (*k*)

Reg. Gen. Hil. T. 2 W. 4, reg. 110, orders, that "where a "pauper omits to proceed to trial, pursuant to notice or an un-"dertaking, he may be called upon by a *rule to show cause* "why he should not pay costs, though he has not been *dis-"paupered.*" (*l*)

A separate motion for costs of the day for not proceeding to trial, is in the *Exchequer* not a rule absolute in the first instance, nor a rule nisi in the common form; but if cause be not shown in four days, it makes itself absolute without any fresh application or motion for that purpose, whereas we have seen that in most other rules there must be a motion by counsel to make the rule absolute. (*m*) It may be moved for even after the plaintiff has tried his cause and recovered a verdict. (*n*)

(e) 4 Taunt. 491; 7 Taunt. 476.
(*f*) See the rules, *post*, 785.
(*g*) *Piercy* v. *Owen*, 1 Dowl. 362; *Lenniker* v. *Barr*, *id.* 563; 2 Crom. & J. 473, S. C.
(*h*) *Johnson* v. *Smith*, 1 Dowl. 421.
(*i*) *Post*, 785; *Hoclim* v. *Reed*, 1 Tyr. 386; *Lenniker* v. *Barr*, 2 Crom. & Jer. 473.
(*k*) *French* v. *Burton*, 2 Cromp. & Jer. 634.
(*l*) As to a pauper's liability, *Doe* v. *Edwards*, 2 Dowl. 474. It must be a rule nisi, *Doe* d. *Lindsay* v. *Edwards*, 2 Dowl. 468.
(*m*) *Robinson* v. *Robinson*, 3 Dowl. 177; *Scott* v. *Marshall*, 2 Tyr. 176, S. P.
(*n*) *Redit* v. *Lacock*, 2 Cr. & M. 337; 2 Dowl. 247, S. C.

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And proposals to refer, made after the commission-day, are no answer to a motion for costs for not trying. (*o*) And the Court will allow an affidavit in support of a motion for costs of the day for not proceeding to trial to be amended. (*p*)

IV. Of motions for *Judgment as in case of Nonsuit.*

The law has provided two modes on behalf of defendants to prevent a plaintiff from keeping actions *suspended* and untried for any indefinite time; viz. a motion for "*a judgment as in case of a nonsuit,*" and a trial by *proviso.* The former originated in the statute 14 G. 2, c. 17, justly intituled, "An "act to prevent inconveniences arising from delays of causes "after issue joined," and enacting, "that where *any issue* shall "be joined in an action or suit at law in the superior Courts, "and the plaintiff *shall neglect to bring such issue on to be "tried according to the course and practice of the said Courts,* "it shall be lawful for the judge or judges of the said Courts "respectively, at any time after such neglect, upon motion "made in open Court, (due notice having been given thereof,) "to give *the like judgment* for the defendant or defendants as "in case of a nonsuit, unless the said judge or judges shall, "*upon just cause and reasonable terms,* allow any further time "or times for the trial of such issues; and if the plaintiff shall "neglect to try such issue within the time or times so allowed "them, the judge shall proceed to give such judgment afore-"said." And sect. 3 provides, "That if such judgment be "given, the defendant shall also have his costs as upon judg-"ments of nonsuit." The very contradictory decisions relating to the practice of moving for judgment as in case of a nonsuit may be attributed to the terms of this enactment, which, it will be observed, speak of the plaintiff's neglect to bring the issue to be tried according to the *then course and practice* of each of the superior Courts, which materially varied as respected *the time* when a plaintiff in a town or country cause *ought to try.* The decisions also varied relating to the necessity for notice of motion. In the C. P. and Exchequer such notice was considered indispensable, and as the terms of the act seem to import; but in the K. B. it was otherwise. These variations in practice have *in part,* but not entirely, been determined, by the Reg. Gen. Hil. T. 2 W. 4, reg. 68, which orders "that a rule nisi for judgment as in case of nonsuit may be ob-"tained on motion *without previous notice;* (*q*) but in that case

(*o*) *Eaton* v. *Shuckburgh,* 2 Dowl. 624.

(*p*) *Larken* v. *Bovill,* 2 Tyr. 746.

(*q*) In Exchequer, before this rule, it was necessary to give four days' notice of

"it shall not operate as a stay of proceedings." Reg. 69 orders, that "no motion for judgment as in case of a nonsuit "shall be allowed after a motion for costs for not proceeding "to trial for the same default, *but such costs may be moved for "separately,* (i. e.) without moving at all for judgment as in "the case of a nonsuit, or after such motion is disposed of, (*r*) "or the Court, on discharging a rule for judgment as in case "of a nonsuit, may order the plaintiff to pay the costs of not "proceeding to trial; (*s*) but the payment of such costs shall "not be made a condition of discharging the rule." (*t*) Reg. 70 orders, that "no entry of the issue shall be deemed neces-"sary to entitle a defendant to move for judgment as in case "of a nonsuit, or to take the cause to trial by proviso." And Reg. 71 orders that "no trial by proviso shall be allowed in "the same term in which the default of the plaintiff has been "made, and no rule for a trial by proviso shall be neces-"sary." (*u*) These statutes and rules, it seems, equally apply to actions ordered to be tried before the sheriff, under the 3 & 4 W. 4, c. 42. (*x*)

Reasons for and against a motion for judgment as in case of a nonsuit.

The inducements to move for judgment as in case of a nonsuit are the natural desire to bring any litigation to a termination, and in defendible actions to avoid the risk of the death of witnesses or loss of the means of establishing other evidence, and the wish of the defendant's attorney to be reimbursed his costs by the plaintiff without calling on his client. When the defence is clear, either of these motives are just and proper; but unfortunately it too frequently occurs that motions for judgment as in case of a nonsuit are made as if they were

motion for judgment, though there was no rule to enter the issue, *Coaltsworth* v. *Martin*, 2 Tyr. 169; 2 Cromp. & Jervis, 123, S. C. So notice was necessary in C. P., 2 Taunt. 48. But in K. B., though seemingly contrary to the words of the statute, no notice was necessary, Lofft, 265; Tidd, 491; Jervis's Rules, 60, note (*s*). The statute probably intended that *notice should be given* so as to afford the plaintiff an opportunity of offering a peremptory undertaking, and save the expense of motion and rule nisi. So a defendant might move for judgment as in case of a nonsuit without giving a term's notice of proceeding, although the cause has been at issue more than four terms, *Shinfield* v. *Laxton*, 4 M. & Scott, 187; 2 Dowl. 778, S. C.

(*r*) After a rule for judgment as in case of a nonsuit has been discharged, without imposing terms as to costs, a rule will be granted for the costs of not proceeding to trial, *Stockin* v. *Reed*, 1 Tyr. 336.

(*s*) See *Lenniker* v. *Barr*, 2 Cromp. & Jer. 473, where it was held that the costs of the day for not proceeding to trial may be obtained as part of the order for discharging a rule for judgment as in case of a nonsuit, though not as a condition precedent.

(*t*) See Jervis's Rules, 60, note (*s*), for the previous practice. Before this rule defendant might, in K. B. or Exchequer, though not in C. P., move for costs of the day, and immediately after for judgment as in case of a nonsuit, Tidd, 759, 760.

(*u*) See previous practice, Tidd, 761.

(*x*) *Begbie* v. *Grenville*, 2 Dowl. 238; *Walls* v. *Redmayne*, 2 Dowl. 508; *Maddely* v. *Bally*, 3 Dowl. 205.

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matters quite of course, without duly considering the evidence and merits, or consulting the client, or communicating consequences; and even without any reasonable ground for confidence that there is an entire defence. In a late case, therefore, Mr. Baron Parke justly observed that, "in nineteen cases out "of twenty, motions for judgment as in case of nonsuit are "against the interest of the defendant;"(y) and it is most injudicious to attempt to force the plaintiff to trial; for many plaintiffs who may either doubt their success, or suspect that the defendant may be insolvent, or may dislike the trouble or expense of a trial, and would therefore gladly remain passive, if not urged to proceed, yet will, if so urged and provoked by a motion of this nature, proceed to trial at all risks, rather than tamely submit to the payment of costs to a debtor or other wrongdoer, and by due exertion will frequently succeed; and therefore undoubtedly it would be culpable in any attorney, without full authority from his client, after due caution regarding the consequences, to adopt a proceeding of this nature; and if he do, and his client fail, he would be responsible to his client in damages.(z)

The practice as to this motion, and in particular the *time* of moving it.(a.)

The *practice* relating to these motions in general have already been so fully considered that we shall only advert to a few more recent decisions.(a) According to the very terms of the statute the Court can only be moved when the plaintiff has neglected *to bring the issue on to be tried according to the course and practice of the particular Court in which the action is depending*; it must therefore be shown to the Court by *affidavit*, and not contradicted, *first*, that the *issue* has been completely and formally *joined*, and if not, as where the similiter had not been added, nor even the *&c.* concluding the plea, the

(y) Per Parke, B. in *Butterworth* v. *Crabtree*, 3 Dowl. 185.

(z) The late Lord Tenterden having, on the home circuit, observed upon the absurdity of indiscriminate motions of this nature, the late Mr. Marryatt reminded his lordship of an action of ejectment tried before him for the recovery of an estate worth 1000*l.* per annum, in Sussex, where the ancestor of the lessor of the plaintiff and himself had been out of possession nearly twenty years, and the latter was advised by an eminent conveyancer that a trial might endanger his title to a still larger property, of which he was and had been in possession for many years, and therefore he had resolved not to try; but in consequence of the defendant's attorney moving for judgment as in case of a nonsuit, and intimating that he would also recover the other property of which the plaintiff was in possession, the latter resolved to try; and in consequence of inadvertence in the defendant's attorney, in not being prepared with evidence of a part of his title (viz. of an outstanding term, on which he principally relied), the plaintiff obtained a verdict, and recovered the estate; whilst if the defendant's attorney had not taken that absurd step the statute of limitations would very shortly have given the defendant a complete title.

(a) See the practice in general, Tidd, 9th ed. 758 to 769; 2 Arch. K. B. 4th ed. 910 to 917. As to time, Chitty's Summary Prac. 163 to 167.

motion for such judgment was discharged with costs;(b) *secondly*, it must appear *when* the issue was joined, or when notice of trial was given, so as to show that the defendant has been in fault for not trying either according to his own notice or within the time allowed by the practice of the particular Court.(c) The affidavit on the part of the defendant should in general be more full and particular than is usual, and it should answer in anticipation any excuse which it is probable may be attempted to be advanced by the plaintiff for not trying; and when it is supposed that the plaintiff will pretend that he suspected the defendant had become insolvent, it will be proper, according to the facts, to swear to the contrary; and in general much more care should be observed in these affidavits than is usually bestowed upon them. It should also be understood by all practitioners, that a rule for judgment as in case of a nonsuit should not in general be moved absolute for three or four days after they *might be so;* because it very frequently occurs that when they have been too hastily moved absolute, counsel for the opponent intimates that he has been instructed to show cause, in which case the rule must be opened, and much time and trouble will be lost in getting back the brief.

We have seen that the necessity for ruling the plaintiff to enter the issue before he moves for judgment is taken away by Reg. Gen. Hil. T. 2 W. 4, reg. 70; but that rule makes no alteration in the time for moving for judgment as in case of a nonsuit, and such time remains exactly as it was before; and the only effect of that rule is to save the necessity for taking that step, and without it the plaintiff is equally bound to proceed to trial as heretofore;(d) and it has recently been decided that the uniformity of process act has made no alteration as to the time of moving for judgment as in case of a nonsuit.(e) As the practice respecting *the time* of moving differs in some respects, at least in a town cause, in C. P. from that in K. B. and Exchequer, it may be convenient to examine the practice of each Court separately.

In the King's Bench.

In the King's Bench.—By the long established practice in K. B. (differing from that in C. P.,) although issue has been joined early enough in the term for the plaintiff to give notice of trial for the sittings after it, or for the next assizes, he is not

(b) *Ante*, 769; *Smith* v. *Parslow*, 2 Tyrw. 284; 2 Crom. & J. 217, S. C.

(c) 1 Hen. Bla. 282; 2 Hen. Bla. 558.

(d) Per Parke, B. in *Williams* v. *Edwards*, 3 Dowl. 183.

(e) *Wingrove* v. *Hodson*, 2 Dowl. 379; see *post*.

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bound to do so; the rule being, that no notice of trial need be given until the term succeeding that in or of which issue was joined; (*f*) and no motion for this judgment can be made *until the third term* inclusive after issue joined, (*f*) unless the plaintiff has given notice of trial previously, and not proceeded to trial in pursuance of such notice; (*g*) in which case, if the notice were given for a trial in the vacation, the defendant may move in the following term; (*h*) or if the notice were given for a trial in term he may move for judgment in the following term, though not in the same term. (*i*) And it seems that where the plaintiff gives notice of trial sooner than he need, but does not proceed accordingly, the defendant may move for judgment in the following term, but not before. (*k*) And where issue was joined in Easter Term, and notice of trial was given for the first sittings in Trinity Term, and the plaintiff having in due time *continued* it till the sittings after that term, it was held that the defendant could not move in that term. (*l*) So where issue was joined in Trinity Term, and notice of trial was given for a sitting in Michaelmas Term, and *countermanded* in time, the defendant cannot move for judgment in that term. (*m*) It was held in the King's Bench, though otherwise in C. P., that if *no notice* of trial has been given, the defendant cannot move until the third term after that in which issue was joined, inclusive thereof; and this although the issue was joined sufficiently early in the first term to have given notice of trial at the sittings in or after that term; (*n*) and therefore in a town cause, where the issue was joined on November 11, a motion in the following Hilary Term was discharged, the plaintiff not having given notice of trial. (*n*) When a town cause has been made a *remanet* from the sittings after Easter Term to the sittings after Trinity Term, and the plaintiff has then made default, the defendant may move for judgment as in case of a nonsuit in the Michaelmas Term following; and the Court said there was a material distinction in this respect

(*f*) 1 Sellon Pr. 408, cites *Hall* v. *Buchanan*, 4 Term Rep. 557; 2 Term R. 734; *Anonymous*, 2 Dowl. 122; 2 Arch. K. B. 4th ed. 912, note (*a*). But note that the Reg. Hil. 20 & 21, Car. 2, there referred to, only orders that issues joined of any *former term* shall be tried the first or second sittings of every term peremptorily.

(*g*) See the decision in the Exchequer, *Wingrove* v. *Hodson*, 2 Dowl. 379, *post*; and 2 Arch. K. B. 4th ed. 912; *Anonymous*, 2 Dowl. 122.

(*h*) 2 Chitty's Rep. 244; Tidd, 764.

(*i*) *Isaac* v. *Goodman*, 2 Dowl. 34; 1 Cr. & M. 494; *Preedy* v. *Macfarlane*, 2 Dowl. 216; *Marshall* v. *Foster*, 2 Dowl. 228; 2 Cr. & M. 213.

(*k*) *Howlett* v. *Powlett*, 8 Bing. 272; 1 M. & Scott, 355; 1 Dowl. 263, S. C.

(*l*) Tidd, 764.

(*m*) *Marshall* v. *Foster*, 2 Cromp. & M. 213; 2 Dowl. 228, S. C.

(*n*) *Munt* v. *Tremamondo*, 4 Term Rep. 557; but see *Frampton* v. *Payne*, 11 Bla. 65, *contra*; Tidd, 759, 764.

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between town and country causes.(o) But when a town cause is *delayed by the general course of business*, or it is not tried in consequence of the non-attendance of special jurymen, and of neither party praying a tales, it is otherwise.(p)

In country causes.

In a *country cause* a plaintiff is not bound to give notice of trial till the term succeeding that in which issue is joined;(q) and if he have not given such notice, the defendant cannot move for judgment till after the *second* assizes after the issue was joined.(r) But if issue be joined (although only *two days*) *before* an issuable term (as in Easter term, or in its vacation, two days *before* Trinity term,) the plaintiff is bound to proceed to trial *at the very next assizes*, whether or not he has given notice of trial; and if he do not then try, the defendant may in the following term move for judgment.(s) But if the issue be not joined until *on or after the first* day of an issuable term, then, unless the plaintiff has given notice of trial for the next assizes, the defendant cannot move for judgment till the term after the *second* assizes, or the *third* term, whether the issue had been entered or not.(t) If the plaintiff give notice to try at any assizes, then if he do not accordingly try, the defendant may, in the term following the assizes, move for judgment.(u) If the country cause be made a remanet, from the pressure of business, or without the plaintiff's default, in general no motion for judgment as in case of a nonsuit is sustainable, the plaintiff having once taken down the cause.(x) Where issue was joined in June, and the trial had been ordered to take place in the *Sheriff's Court*, and there had been two distinct sittings in the Sheriff's Court (which it was insisted by the defendant ought to be deemed equivalent to two assizes), Parke, B. held otherwise, and that a motion for judgment in Michaelmas term was too early; though if the plaintiff had given notice of trial he would have waived his right to the full time; but intimated that the Court would consider whether in future a *country* cause before a sheriff should not be put on the same footing as a town cause, as both are now in

(o) 6 Bar. & Cres. 152; 2 B. & Ald. 709; Tidd, 763.
(p) 9 Bar. & Cres. 769.
(q) 2 Term R. 734; and see 2 Bing. 360.
(r) *Id.*; 9 Moore, 687; 1 Cromp. & J. 18; *Miller* v. *Hasall*, T. T. 9 G. 4; Tidd, Supp. 135, *sed quære*.
(s) *Williams* v. *Edwards*, 3 Dowl. 183, Exchequer, *post*; *Spiers* v. *Parker*, and *Crowley* v. *Dean*, 1 Crom. & J. 18.
(t) *Id. ibid.* note (b), citing Jervis's Rules, 60, note (s); *Crowley* v. *Dean*, 1 Crom. & J. 18; *Simon* v. *Folkingham*, 1 Tyr. 501, *id.* note (c), referring to *Miller* v. *Hasall*, Trin. T. 9 Geo. 4; Supplement to Tidd, 764.
(u) Tidd, 764.
(x) 3 Term R. 1; 3 Bing. 499; 6 B. & Cres. 125; Tidd, 763.

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effect in the same situation.(y) Where the plaintiff made default in proceeding to trial at the summer assizes, pursuant to his notice, and in the following Michaelmas term the defendant moved for and obtained costs of the day, and the plaintiff did not give notice of trial or try at the following spring assizes, it seems to have been doubted whether the defendant was not premature in his motion in the subsequent Easter term.(z)

In the Common Pleas.

In the Common Pleas the practice is stated to be that in a town cause the plaintiff is obliged to give notice of trial *in the same term* in which issue is joined, if it was so joined early enough in the term to give such notice, (a) and that if he do not, or if he give notice of trial and do not proceed to trial in pursuance of his notice, the defendant may move for judgment *in the next term*; (b) but that if issue be joined so late in the term that notice of trial cannot be given in that term, the plaintiff has the whole of the next term to try his cause, and the defendant cannot move for judgment until the third term. (b)

In *country causes* the plaintiff is *not bound* to try at the *next assizes* after issue joined, and the defendant cannot move for judgment until the third term. (c)

In the Exchequer.

In the Exchequer, the rule has recently been stated to be, that "in a town cause the plaintiff has the whole of the term "after that in which issue is joined to try. There is no de-"fault till the third term. There must be a default. You "may come the term next after that in which the issue was "joined, *if notice of trial has been given* and no trial accord-"ingly; but not till the following term, if no notice has been "given." (d) In that case the issue had been joined in July, 1833, and delivered in October following, but without any notice of trial, and a motion for judgment was made in the following Hilary term, which the Court considered premature, saying it was quite clear that a defendant had no right to

(y) *Butterworth* v. *Crabtree*, 3 Dowl. 184; *Begbie* v. *Grenville*, 2 Dowl. 238, *sed quære*; and see *Maddeley* v. *Batty*, 2 Dowl. 203.

(z) *Moseley* v. *Clark*, 2 Dowl. 66.

(a) 2 Arch. C. P. 251, refers to Reg. Mich. T. 1834, XXI; but which contains no such regulation. In 1 Sellon's Prac. 408, however, the same practice is stated as distinguishable from that in K. B. and *Frampton* v. *Payne*, 1 Hen. Bla. 65, is referred to; but then it is added, "but the plaintiff has the whole of the next term after issue is joined to try his cause in, *Baker* v. *Newman*, 1 Hen. Bla. 123."

(b) 2 Arch. C. P. 251, cites *Frampton* v. *Payne*, 1 Hen. Bla. 65; 2 Hen. Bla. 558; 2 New Rep. 397.

(c) 2 Bing. 360; 9 Moore, 687.

(d) Per Bayley, B. and Vaughan, B. after consulting Parke, B. and Patteson, J. in *Wingrove* v. *Hodson*, 2 Dowl. 379; *Anonymous*, 2 Dowl. 122, S. P.

move until the third term after issue joined, unless notice of trial had been given. (*e*)

In another case, where the issue had been joined in Trinity term and notice of trial given for the *first sitting* in the following Michaelmas term, but the cause had not been set down, the Court refused a rule for judgment, saying, "You "cannot move in the same term in which default was "made." (*f*)

In the Exchequer it was held that where issue was joined in a town cause in the term, and notice of trial was given for a sitting in it, but was countermanded, it was premature to move *in the same term* for judgment as in case of a nonsuit, on an affidavit that the plaintiff had given notice of trial and neglected to proceed to trial. (*g*)

Of further proceedings and motion for judgment as in case of a nonsuit.

We have seen that judgment as in case of a nonsuit is to be given, *unless the said judge or judges shall upon just cause and reasonable terms allow any further time or times.* (*h*) *First*, are to be considered *what excuses* or circumstances have been considered a *just cause*. *Secondly*, what is not *just cause*.

I. What a sufficient cause.

In general a *slight cause* or ground of excuse for not trying is deemed sufficient on the *first* default, but there must be *some*, and if not, the defendant is not bound to accept a peremptory undertaking, and the motion for judgment will be absolute. (*i*) Where an action was brought for false imprisonment, and the defendant afterwards indicted the plaintiff for an assault, charged to have been committed at the time the plaintiff was imprisoned, a motion for judgment was discharged with costs, the Court saying it was not reasonable to expect that the plaintiff should proceed with his action whilst the defendant's proceedings relating to the same subject-matter were still pending. (*k*) And where pending an action against a supposed acceptor the drawer paid the amount of the bill and the costs of the action against himself, that fact was held to be a sufficient answer to the acceptor's motion, although he denied his liability; and the Court said that he was not entitled to require a peremptory undertaking, and he might try by proviso; (*l*)

(*e*) *Id. ibid.*; *sed quære*, was not the issue to be considered as of *Trinity* term, and if so, was *not Hilary* the third term?

(*f*) *Preedy* v. *Macfarlane*, 2 Dowl. 216; and see *Begbie* v. *Grenville*, 2 Dowl. 238.

(*g*) *Isaacs* v. *Goodman*, 3 Tyrw. Rep. 559; see Reg. Gen. Easter, 5 G. 4; 1 Tyr. Rep. 1, App. XII.

(*h*) *Ante*, 784; 14 G. 2, c. 17, sect. 1.

(*i*) Per Curiam in *Nicholl* v. *Collingwood*, 2 Dowl. 60; *Cleasby* v. *Poole*, 3 Dowl. 162, S. P. *post*, 793, note (*u*).

(*k*) *Long* v. *Hutchins*, 1 Hodge's R. 56; 3 Dowl. 414, S. C.

(*l*) *Monk* v. *Bonhan*, 2 Crom. & M. 430; 2 Dowl. 336; 4 Tyr. 312, S. C.; but see *ante*, 740, note (*g*), where it appears that to prevent the costs of a trial by proviso a plaintiff must pay costs, sup-

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and where a plaintiff has *once taken down his cause to trial* at the assizes when it was made a remanet, the defendant cannot obtain his judgment, although the plaintiff gave a subsequent notice of trial, on which he took no steps. (*m*) So where the plaintiff has once taken his cause to trial and been nonsuited, which was afterwards set aside, the defendant cannot move for judgment, but should try by proviso. (*n*) And where a plaintiff, at the request of the defendant's attorney, delayed the trial, it was held that the defendant could not move for judgment, and his application was discharged with costs. (*o*) So where a defendant took out a summons for putting off the trial, and at the instance of the defendant the hearing stood over from the 12th to the 19th of March, and the plaintiff then thinking he might be put to inconvenience in getting ready for trial if the order was refused, countermanded, it was held that the defendant could not move as upon a default of the plaintiff. (*p*) And it is a sufficient excuse and answer to a motion for judgment for not proceeding to trial pursuant to notice, that the cause was withdrawn in order to obtain a special jury, counsel having advised that it would be imprudent to try by a common jury, and the defendant was compelled to accept a peremptory undertaking. (*q*) And it is a general rule that a rule for judgment as in case of a nonsuit will not be made absolute while it sufficiently appears to the Court by affidavit that any thing remains due under an agreement between the parties to pay by instalments. (*r*)

What not a sufficient cause.

What is not a just cause. An affidavit, in answer to the defendant's motion, stated that an agreement had been entered into between the parties on certain terms, which had been performed, and that the suit was determined, each party to pay his own costs, is not sufficient, for the plaintiff should have made a separate motion to stay the proceedings, and the Court required the plaintiff to give a peremptory undertaking. (*s*) Nor is it any excuse that the action was brought by an attorney without the plaintiff's authority, for the plaintiff's remedy is against the attorney, and his misconduct is not to affect the

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posing the defendant really has a defence on the ground of forgery.

(*m*) *Gilbert* v. *Kirkland*, 2 Dowl. 153.

(*n*) *Ashley* v. *Flaxman*, 2 Dowl. 697.

(*o*) *Jenkins* v. *Charity*, 2 Dowl. 197; *Doe* v. *Lord*, 2 Dowl. 419; and see *Downes* v. *Crost*, 2 Cromp. & J. 466 as to arrangements precluding a defendant from moving.

(*p*) *Rendell* v. *Bailey*, 2 Dowl. 113.

(*q*) *Webber* v. *Roe*, 3 Dowl. 589.

(*r*) *Anonymous*, 1 Tyr. Rep 378.

(*s*) *Greenslade* v. *Nunn*, 1 Gale, 46, *sed quære*.

defendant. (*t*) And it is no excuse that the plaintiff being insolvent had neglected to supply his attorney, and therefore the latter withdrew the record; and although the plaintiff offered a peremptory undertaking, the Court made the rule for judgment absolute, saying it was a good answer for the attorney, but not for the client, and there must be some cause alleged before they could discharge the rule, (*u*) otherwise it would repeal the statute.

The circumstance of the defendant having since the Reg. Gen. Hil. Term, 2 W. 4, unnecessarily ruled the plaintiff to enter the issue, is no ground of opposition to his motion for judgment. (*x*) And where a defendant is entitled to move for judgment as in case of a nonsuit he is not deprived of his right to move by the plaintiff's giving notice of trial before the motion; and therefore on such motion the plaintiff must, at all events, give a peremptory undertaking. (*y*) And where an action of ejectment was brought on certain breaches, and money was paid into Court, as to that for nonpayment of rent, and the plaintiff took it out, and did not proceed to trial, the defendant is entitled to move for judgment, unless the plaintiff gave notice that he had abandoned all further proceedings; but the Court recommended a stet processus and reference to the master, to say whether the plaintiff ought to pay any costs for not proceeding to trial upon the remaining breaches. (*z*) And if a plaintiff, knowing the insolvency of the defendant, declare against him on being ruled to prevent nonpros, and afterwards discharge a rule for judgment as in case of nonsuit by giving a peremptory undertaking, the Court will not afterwards discharge the same, for he should have applied to the Court or discontinued at an earlier stage. (*a*)

Of Peremptory Undertakings.

"*And reasonable terms.*" The statute, it will be observed, allows an extension of time once or even oftener, if just cause appear, and *upon reasonable terms*. (*b*) The latter usually are the giving a *peremptory undertaking* to try at the next or other named opportunity; and if by any unforeseen accident a trial then be prevented, such undertaking may, upon reasonable terms, *be enlarged*, so as to allow the plaintiff to try at a subsequent time. To excuse a trial pursuant to a peremptory undertaking, a still stronger cause or reason must be made

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(*t*) *Mundry* v. *Newman*, 1 Crom. M. & Ros. 402.

(*u*) *Cleasly* v. *Poole*, 3 Dowl. 162.

(*x*) *Sargeant* v. *Jones*, 2 Dowl. 420.

(*y*) *Smedley* v. *Christie*, 2 Dowl. 152.

(*z*) *Doe* v. *Towgood*, 2 Dowl. 404.

(*a*) *Cunningham* v. *Rees*, 1 Tyr. 1.

(*b*) *Ante*, 784.

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appear than in the first instance, and the discovery just before the trial would otherwise have taken place that the declaration required amendment, and that a proposal to refer was going on, and therefore the notice of trial at the next assizes was countermanded, were held inadequate excuses. (*b*)

Plaintiff's motion to *enlarge* undertaking.

When the plaintiff has not tried according to his undertaking, in consequence of the absence of a material witness, then, in order to prevent the rule being absolute, he is to anticipate the application of the defendant by moving *to enlarge* his peremptory undertaking until a subsequent sitting or assizes; and the affidavit in support of such motion need not state the name of the absent witness; and the Court said it might be often very dangerous and inconvenient to name the witness, though on a second default it is necessary. (*c*) Where a plaintiff has given a peremptory undertaking but not by rule, the rule for judgment as in case of a nonsuit for not fulfilling that undertaking is *nisi* in the first instance. (*d*)

(*b*) *Haines* v. *Taylor*, 2 Dowl. 644.
(*c*) *Montfort* v. *Bond*, 2 Dowl. 403.
(*d*) *Vokins* v. *Snell*, 2 Dowl. 411.



CHAPTER XXV.

OF THE JURY AND JURY PROCESS, VIEWS, AND THE NISI PRIUS RECORD.

CHAP. XXV. JURY AND JURY PROCESS.

Of the necessity for inquiries respecting the qualifications, &c. of each juror.

THE *qualification of jurors* and the *jury* process are principally governed by stat. 6 Geo. 4, c. 50, which repeals and consolidates most of the previous statutes on the subject. The history and practice relating to these subjects will be found in the works referred to, (*a*) and the latter demands much more attention than has usually been given to it, and the statute in particular should be well considered; (*b*) at all events more care and attention should be devoted to the examination of the *panel* of common jurors and list of special jurors, and in adequate time before the trial, full inquiries should be made into all circumstances which might render any one or more of such jurors unfit to try the cause; so that if any objection exist, care be taken to prevent that person being sworn on the jury; because if his interest, opinion, or prejudice, should be *adverse* to the client, either may occasion the loss of the verdict, or if he should be *too favourable* to the client, and the latter obtain the verdict, it might on that ground be set aside, even though it be sworn that such juror wished to find a contrary verdict. (*c*)

(*a*) 3 Bla. Com. chap. 33; Tidd, 9th ed. 777 to 795; 851 to 858; 1 Arch. K. B., 4th ed. 306 to 312; *id.* 348 to 355; 1 Chitty's Crim. Law, 2d ed. 500 to 551.

(*b*) See Chitty's Col. Stat 627 to 643, and notes.

(*c*) We have seen that it has been considered that a judge, and a fortiori, a juror, ought not to interfere in a cause where the nephew even of his deceased wife is a party, *ante*, vol. iii. 9; and any relationship, even more distant than the

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II. Of the Jury Process in general.

The *proceedings* to summon a jury to try a cause are, *first*, the writ of *venire facias juratores*, and *secondly*, in K. B. and Exchequer, a writ of *distringas juratores*, and in C. P., in lieu of that writ, a writ of *habeas corpora juratorum*, each of which is directed to the sheriff; and the former commands him to return twelve good and lawful men of *the body* of his county, qualified according to law, and not as heretofore any *hundredors*; (*e*) and sect. 15 enacts, that the sheriff shall, upon his return of such writ of *venire facias*, *annex a panel* of not less than *forty-eight* jurors, containing the names alphabetically arranged, together with the places of abode and additions of such jurors, and it is provided that in the writ of *habeas cor-*

ninth degree, is even a ground of challenge to a juror. In *Dauncey* v. *Colonel Berkeley*, on a motion for a new trial, argued in K. B. in Trinity Term, A. D. 1827, in an action for crim. con. it appeared that the plaintiff was a bankrupt and had obtained his certificate, and was consequently clearly entitled to receive for his own use the £1000 recovered by the verdict, yet the Court made absolute a rule for a new trial, merely because it appeared that one of the special jurors was the *plaintiff's assignee*, (and although it was sworn that he pressed his co-jurors to find a verdict for only £750 damages), saying that although the juror had no legal or beneficial interest in the verdict, still there might be a *feeling* to increase the amount, and that it was essential that every juryman should be *wholly free*, even *from suspicion* of bias and be *omne exceptione majores*. It may be scarcely practicable to discover every secret ground of influence, but still an active practitioner should exert every possible inquiry so as to exclude any questionable juror, and if any suspicion exist of the partiality of any particular juror, it is not necessary *formally* and *publicly* to *challenge* him, but the counsel retained in the cause may, by *private* intimation of the objection, prevent the objectionable juror from being sworn. It is well known that in Ireland leases for the lives of two or three named persons are a common tenure. On a recent trial there of an indictment for an atrocious murder, the judge observed to the jury, that the case was unhappily so clear, that perhaps they would consider it unnecessary for him to sum up the evidence, whereupon all the jury said certainly. But one of them said, as it was a case of life and death, it would be most decent to retire to consider of their verdict. Upon which the jury were closeted for a considerable time, the juror who had proposed the retiring, declaring, that however clear the case might seem, he could never bring his mind to a verdict of guilty; at length the other jurors said, that if he would assign a *good reason* they would concur; upon which he exclaimed, why, "*He's the last life in my lease*;" and he with the rest of the jury, whose estates were of similar tenure, to the astonishment of the crowded Court, immediately delivered their unanimous verdict, *Not Guilty*. The numerous grounds of challenge, either to the array or to the poll, and especially those *propter affectum*, will be found in the works before referred to.

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(*e*) *Rogers* v. *Smith*, 1 Adol. & El. 772; 3 Nev. & Man. 772.

Venire facias juratores in K. B.*

(*f*) William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith. To the Sheriff [*or* "Coroner"] of ——, [*or* "to —— and —— elisors duly appointed in this behalf,"] greeting. We command you that you *cause to come* before us at Westminster *forthwith* [*or* "on ——," *making the writ returnable on a particular day before the trial*] *twelve* good and lawful men of the body of your county, qualified according to law, by whom the truth of the matter may be better known, and who are in nowise of kin either to A. B. the plaintiff or to C. D. the defendant, to make a certain jury of the country, between the parties aforesaid, in an action on promises, [*or* "of debt," &c. *as the action may be,*] because as well the said C. D. as the said A. B, between whom the matter in variance is, have put themselves upon that jury, and have there then the names of the jurors and this writ. Witness [*name of chief justice*] at Westminster, the —— day of ——, in the —— year of our reign.

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* See variations and forms in C. P. and Exchequer, Tidd's Forms, 289; T. Chitty's Forms, 150.

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practice relative to jury process, as well common as special, will be collected from the works referred to. (g) In practice the two writs of Venire and Distringas, or Habeas Corpora, are issued at the same time. It is the safer course to have *each returned, as well as a panel annexed to each,* so that both, with the two panels, may be afterwards annexed to the nisi prius record before it is entered with the marshal. (h) At the same time it is said that the venire is not used, and is sued out merely for the purpose of having it allowed in costs; (i) and if that were so, the issuing a venire should be abolished; but the observation was made before the passing of 6 Geo. 4, c. 50, sect. 13, which seems expressly to require that writ as well as the distringas or habeas corpora.

The Venire Facias Juratores in particular.

The Venire must be directed according to the award of it on the issue roll, (k) and its form in all respects not altered by 6 Geo. 4, c. 50, s. 13, is by that act directed to be in the *accustomed form.* By 3 & 4 W. 4, c. 67, s. 2, the venire, except in trials at bar, *may* be tested on the day on which it is issued, and be made returnable *forthwith.*

The *Distringas* juratores and *Habeas corpora juratorum* in particular.

The *distringas juratores* in K. B. or Exchequer, or *habeas corpora juratorum* in C. P. is to be directed the same as the venire and correspond therewith, and is to be tested on the return day of the venire, and in causes at nisi prius may be returnable on the first day of the term after the trial; or, since 3 & 4 W. 4, c. 67, sect. 2, it *may* be *tested* in term or vacation on a day subsequent to the teste of the writ of venire facias juratores. (l)

Form of *Habeas corpora juratorum in C. P.*

William the Fourth, [*— as in first form, ante,* 797,] to the sheriff of ——, greeting. We command you that you *have* before our justices at Westminster, on ——, [*the next general return after the trial,*] or before the right honourable [*the name of the chief justice,*] our chief justice assigned to hold pleas in our Court of the Bench, by force of the statute in such case made and provided, if he shall first come, on the —— day of ——, [*the day of trial,*] at the Guildhall of the city of London, [*or, if in Middlesex,* " at Westminster Hall, in your county," *or, if at the assizes,* " before our justices assigned to take the assizes in your county, if they shall first come, on ——, the —— day of ——, [*the commission day of the assizes,*] at ——, [*the place where the assizes are holden*] in your said county,] the bodies of the several persons named in the panel annexed to this writ,* [*or, if a special jury,* " the bodies of S. P., of ——, T. R. of ——," &c. *naming them as in the prothonotary's paper,*] jurors summoned in our Court, before our justices at Westminster, between A. B. plaintiff, and C. D. defendant, in an action on promises, [*or,* " of debt," *or as the plea may be,*] to make that jury, and have there this writ. Witness ——, [*the name of the chief justice,*] at Westminster, the —— day of ——, in the —— year of our reign.

(g) 3 Bla. Com. chap. 23, of the trial by jury; Tidd, 9th ed. 777 to 795; 1 Arch. K. B. 4th ed. 306 to 313; 1 Arch. C. P. [100], 154 to 160.

(h) 1 Arch. C. P. [100].

(i) 1 Sellon, 427; 1 Arch. K. B. 308.

(k) 1 Arch. K. B. 4th ed. 307.

(l) 3 & 4 W. 4, c. 67, sect. 2.

* And this is indispensable, *Rogers* v. *Smith,* 1 Adol. & El. 772; 3 Nev. & Man. 772, S. C.; *ante,* 797, note (*s*).

The statute, 13 Car. 2, stat. 2, c. 2, s. 6, provided that it shall not be necessary that there be fifteen days between the teste and return of a distringas.

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If the trial stand over from one sitting to another, the *distringas or habeas corpora must be resealed* previously to the sitting to which it stands over, otherwise the marshal must not insert it in the daily list of causes for trial, and the cause cannot be tried; (m) for the rule Hil. T. 4 W. 4, reg. 18, which dispenses with the necessity of *repassing* the *nisi prius record,* does not dispense with the *resealing* of these writs, but enables a judge, on an exparte application, to amend the day of the teste and return of the distringas or habeas corpora, or the clause of nisi prius. (n)

The Practice.

In practice the writs of venire and distringas or habeas are issued at the same time. (o) They may be purchased at a stationer's, and filled up by the plaintiff's attorney, and then sealed and taken, in a town cause to be tried in *Middlesex,* to the office of the undersheriff of that county in Red Lion Square, and who will return the distringas or habeas. It is, as we have seen, *safer,* and best accords with the directions of the statute, 6 G. 4, c. 50, to have the *venire* as well as the distringas or habeas returned, and a panel of the jurors annexed to each; (p) at all events a panel must be annexed to the latter, and if omitted, a writ of error would be sustainable. (q) If the cause is to be tried in *London,* similar proceedings are to be adopted, excepting that the undersheriff's or secondary's office is in Coleman Street. In *country causes,* the venire is to be taken to and returned by the deputy of the proper undersheriff in London, and the distringas or habeas was returned by the undersheriff in the proper county, or since the appointment of a deputy under 3 & 4 W. 4, c. 42, within a mile of Inner Temple Hall, by such deputy, (r) and to the venire as well as the distringas and habeas, a *proper panel* is to be annexed in pursuance of 6 G. 4. c. 50. The several writs must be taken to the proper offices in sufficient time to enable the sheriff to summon the jury in proper time as presently directed; and the statute 6 G. 4, c. 50, seems imperative, that both the writs shall be sent to the undersheriff, in the case of common jurors *ten days,* and in the case of special

(m) Reg. East. T. 33 G. 3, reg. 1; Reg. Mich. 6 G. 4; 1 Arch. K. B. 4th ed. 305, 309.

(n) 1 Arch. K. B. 4 ed. 305.

(o) 1 Arch. K. B. 4 ed. 306, 308.

(p) 1 Arch. C. P. [100].

(q) *Ante,* 797, note (e).

(r) *Ante,* vol. iii. 47.

juries *three days at least,* before the commission day at the assizes. (s) If a cause has been tried and a verdict taken for the plaintiff, subject to an award, but which is not made in time, it seems that such verdict must be cancelled by leave of the Court before the plaintiff can again proceed to trial, and the order of a judge to amend the teste of the distringas before the second trial will not suffice. (t)

Of the *Panel,* summoning the jury, &c.

The statute 6 G. 4, c. 50, regulates the conduct of the sheriff as to lists of common jurors, and his conduct, and time, and manner of summoning them, and requires the sheriff to annex a *panel* to the venire, and also to the distringas and habeas. (u) Such panel contains the name and additions of residence and degree of trade or occupation of each juror alphabetically arranged, printed on a long narrow slip of parchment. The 25th section directs that *common jurors* shall be summoned *ten days* before the day of attendance *on the circuits,* by showing to the man to be summoned, or in case he be absent from the usual place of abode, by leaving with some person there inhabiting, *a note* in writing, under the hand of the sheriff or other proper officer, containing the substance of the summons; and special jurors are to be summoned in like manner, *three days* at least before the day on which they are to attend. But it is provided that jurors for London or Middlesex shall be summoned as heretofore, and the statute contains enactments relative to fines for nonattendance. (x)

What communications with jurors improper.

It has been held that the circumstance of one of the parties verbally or in writing soliciting one or more jurors, particularly when special jurors, to attend the trial, without more, is not to be deemed an illegal *labouring of the jury to find a verdict for a party.* (y) But although it may be natural to desire that when the expense of a special jury has been incurred their attendance should ensue, *yet, unless the attornies on both sides* will concur in a *joint* written application to each of the special jurors requesting their attendance, on the ground that *both parties* wish the question to be decided by gentlemen of superior intelligence, yet there is always risk of an exparte

(s) *Chalton* v. *Burfit,* 1 Moore & Scott, 450.

(t) *Evans* v. *Davies,* 3 Dowl. 786.

(u) *Ante,* 797, n. (e).

(x) See the enactments and cases in Chitty's Col. Stat. 635, 636; *ante,* vol. ii. 397.

(y) Tidd, 9th ed. 906; *Snell* v. *Timbrell,* 1 Stra. 643; Co. Litt. 157; 1 Arch. K. B. 4 ed. 353. In a case of appeal in the House of Lords, July, 1835, Lord Brougham said that the *solicitors* might without impropriety request any particular peer to attend, but that it was improper for Counsel so to interfere.

application being misunderstood; for special jurors so applied to have been known to resent the application and consider it either as an imputation that they would neglect their duty to attend when summoned, or attribute it to impropor expectation, or hint that the juror will find in favour of the party so applying, saying, Why otherwise would he trouble me on the subject? At all events, the communicating either publicly or privately any information against the character or the cause of the opponent, to one or more of the jury, would endanger the verdict if against him, (z) and even be punishable as a grave misdemeanour. (a)

Special jury.

The jury act, 6 G. 4, c. 50, contains the principal directions relating to *special juries*, and which have been already so fully stated in other works, that we will only add references to subsequent enactments and decisions. (b) It having been held under the 34th section, that a judge's power to certify for costs, viz. that the cause was proper to be tried by a special jury, only extended to *verdicts*, and not to a case where the plaintiff was nonsuited; (c) the 3 & 4 W. 4, c. 42, extended that power to *nonsuits*. (d) In a late case the lord chief justice declared that it was the especial duty of attornies who had applied for a special jury, to take care and attend, and be provided with, the means of paying to each special juror the proper fee at the proper time; (e) and hence it is not the duty of an attorney to apply for a special jury unless his client first provide him with sufficient money for the purpose. It has been observed that obtaining a rule for a special jury is a common mode of delay adopted by defendants, as they can in general gain a term by it; (f) it would therefore be advisable to introduce some restrictive regulation, as either the leave of the Court or a judge, or a written certificate of counsel that the cause is in his judgment fit to be tried by a special jury. To avoid this delay, the *Court* will, on affidavit of admission of the debt by the defendant, or other strong ground, discharge the rule; (g) but the Court refused to discharge a rule for a special jury on the ground that the defendant had obtained it in June 1831, and up to Michaelmas term following had omitted to strike the jury, although the cause stood for trial in July. (h) When

(z) *Coster* v. *Merest*, 3 Brod. & Bing. 272; 7 Moore, 87, S. C.; Tidd, 966.
(a) *The King* v. *Jolliffe*, 4 Term Rep. 285.
(b) Tidd; 1 Arch. K. B. 4 ed. 309 to 313.
(c) *Wood* v. *Greenwood*, 10 Bar. & Cres. 689.
(d) 3 & 4 W. 4, c. 42, sect. 35.
(e) Per Lord Denman, C. J. sitting Middlesex after Trin. T. 1835.
(f) 1 Arch. K. B. 4th ed. 312.
(g) *Cradock* v. *Davis*, 1 Chitty's Rep. 176; *Doe* v. *Lorimer*, *id.* 236; *Bloxam* v. *Brown*, 4 Taunt 470.
(h) *Andrews* v. *Thornton*, 8 Bing. 64.

it is obvious that the application for a special jury is for delay, the chief justice or judge, who would try the cause, may be applied to for his order that the cause shall be tried at one of the sittings in the term. (*i*) In the King's Bench the rule for a special jury in term time must be served a reasonable time before the trial, or the cause may be tried by a common jury, and therefore where a cause stood for trial at a sitting in term, and after the rising of the Court on the day before the trial, the defendant served the plaintiff with a rule for a special jury, and the cause was, notwithstanding, tried by a common jury, the Court of King's Bench held the proceedings regular. (*k*)

At the sittings after term no trial can be had by a special jury in Middlesex or London unless the rule be served on or before the day preceding the adjournment day. (*l*) It must also have been marked on that day as a special jury cause in the marshal's book. (*m*)

In the Common Pleas an express rule orders that no cause shall be tried by a special jury in Middlesex or London unless the rule for such special jury shall be served and the cause marked in the marshal's book as a special jury cause two days previous to the adjournment day. (*n*)

Time of trial, and discharging a rule for special jury.

The Court *in banc* will not forward or alter the order of the trial of special juries, although the rule has been obtained for delay. (*o*) But the chief justice will in some cases make an order as to the time of trial. (*p*) If the defendant has not summoned the special jurors in time the cause will be tried by a common jury; (*q*) and when it is shown by affidavit, not sufficiently contradicted, that the rule for a special jury has been obtained for delay the Court will on motion discharge the rule. (*r*) In the Common Pleas the Court will not so interfere, but will appoint a day for trial by the special jury, even in term, unless the defendant will submit to proper terms. (*s*) If

(*i*) *Johnson* v. *Gas Light Company*, 7 Taunt. 390; *Roberts* v. *Bradshaw*, 1 Stark. Rep. 31; *Briggs* v. *Dixon*, 4 Moore, 414, 470; *Maltby* v. *Moses*, 1 Chitty's Rep. 489.

(*k*) *Gunn* v. *Honeyman*, 2 B. & A. 400; and see *Johnson* v. *Blackwell*, 6 Car. & P. 236, *post*, 803, note (*t*); Tidd, 793, 795, 817.

(*l*) Rule Trin. 30 G. 3; Rule Hil. 44 G. 3, K. B.; 10 East, 1; Tidd, 817, 793, note (*b*).

(*m*) Chitty's Summary Prac. 175.

(*n*) Rule Trin. T. 52 G. 3 C. P.; 4 Taunt. 600; 2 Chitty's R. 378; Chitty's Summary, 176.

(*o*) *Maltby* v. *Moses*, 1 Chit. R. 489; Tidd, 818; *Johnson* v. *The Coke and Gas Light Company*, 7 Taunt. 390; Tidd, 795; *ante*, vol. iii.

(*p*) *Maltby* v. *Moses*, 1 Chit. R. 489; Chitty's Summary, 180.

(*q*) *Archer* v. *Bamford*, 1 C. & P. 64; Tidd, 818, 795.

(*r*) *Cradock* v. *Davis*, 1 Chit. R. 176; *Doe* v. *Lorimer*, *id.* 236; *Maltby* v. *Moses*, *id.* 489; Tidd, 794.

(*s*) *Bloxam* v. *Brown*, 4 Taunt. 470; *Briggs* v. *Dixon*, 4 Moore, 414; *Tripp* v. *Patmore*, *id.* 470; *Johnson* v. *The Coke and Gas Light Company*, 7 Taunt. 390; Tidd, 795.

a rule be obtained on Saturday to make a cause a special jury, which is marked as a special jury at 2 o'clock on that day, and notice of it is given to the plaintiff's attorney at 7 o'clock on that evening, the cause being in the list for Monday, the judge will try it in its order on Monday as a common jury cause, although there be an affidavit of merits.(t) The application for a judge's certificate, that the cause was fit to be tried by a special jury, must be made immediately after the verdict; and an application on the day after the trial is too late.(u) As a general rule, it seems that in an action for a libel the judge will probably certify, if a justification has been pleaded; but not if there be only a plea of general issue.(x)

Judge's certificate.

III. Of a View. (y)

In many actions, especially those relating to nuisances and boundaries, *a View* of the premises may be very useful; and the proceedings to obtain the same are principally regulated by 6 G. 4, c. 50, sect. 23. The writ of view must contain the name of a shewer appointed by the defendant, as well as of one appointed by the plaintiff, otherwise the costs of the view will not be allowed under that statute.(z) The rule of Trin. T. 7 G. 4, required an affidavit, and leave of the Court or a judge, in order to obtain a view; but the subsequent rule of Hil. Term, 2 W. 4, reg. 63, orders, that " the rule for a view may " in all cases be drawn up by the officer of the Court on the " application of the party, without affidavit or motion for that " purpose."(a) So that now either party may of right, and without affidavit or leave of the Court or of a judge, insist on a view. It is scarcely necessary to insinuate, that in an action for a nuisance, attributable to the working of a steam engine, or other machinery, and many others, it is very essential at the time of view that persons on each side should be so placed during the *whole time* whilst experiments are proceeding, as well on the premises from which it is alleged the injury proceeds as upon the premises where the injury is felt; so as to prevent the too frequent frauds, by secretly reducing or increasing the power of the works in operation whilst the jury proceed from one of the premises to the other.

(t) *Johnson* v. *Blackwell*, 6 Car. & P. 236.

(u) *Waggett* v. *Shaw*, 3 Campb. 316; Tidd, 792.

(x) *Roberts* v. *Brown*, 6 Car. & P. 757.

(y) See practice in general, Tidd, 795 to 799; 1 Arch. K. B. 313, 314.

(z) *Taylor* v. *Thompson*, 7 Bing. 403.

(a) Jervis's Rules, 59, note (m).

CHAP. XXV. JURY AND JURY PROCESS.

IV. OF THE RECORD OF NISI PRIUS.

Before the uniformity of process act, 2 W. 4, c. 39, the very great variety of mesne process then in practice occasioned an equal variety in the forms of *Nisi Prius Records;* because such records were merely descriptive of such process and of the pleadings; but now that the process has been simplified, *one general form* of record has been prescribed by Reg. Gen. Hil. T. 4 W. 4, and which is stated in the subscribed note.(*b*) When the cause is to be tried in a county palatine the record is to conclude with an award of the *mittimus,* the same as the issue in such cases. The first part of the record is an exact copy of the issue, stating the name of the Court at the top, and then the date of the declaration, with the statement whether the defendant was summoned or arrested to answer the plaintiff, and the exact date of the writ is mentioned, so that the time of commencing the action cannot be disputed at nisi prius, which is certainly a great improvement in practice.(*c*) Then follows the whole declaration, and each of the pleadings is to commence a new line, stating the date of its title; and it has been observed, "that it would much facilitate reference if attornies, in engrossing the records, and also in making copies of paper-books for the judges, would denote in the margin by the words 'first count,' 'second count,' and so on, the commencement of the different counts of a declaration:"(*d*) and the same observation might also be extended to the rest of the pleadings.(*d*) And Reg. Easter T. 18 Car. 2, K. B. directed, that at the foot of each pleading signed by counsel his name shall *appear* in the Paper-Book, *and in all copies of pleadings.*

Suggestions when necessary.

As the *whole* of the issue is to be engrossed, any suggestion of death, or other event, will necessarily appear on the record before the award of the venire. If any death or other material event has occurred *since the issue* was delivered, and before the

Form of *nisi prius record in* K. B., C. P., or Exchequer, as prescribed by Reg. Gen. Hil. T. 4 W. 4.

(*b*) The placita are now to be omitted, Reg. Gen. Hil. T. 4 W. 4, and the record of nisi prius in each of the superior Courts is to be a mere copy of the issue to the end of the award of the venire, and then proceed as follows:—

Afterwards on the* —— day of ——, in the year of our Lord, —— [*this is to be the teste or date of the writ of distringas, or habeas corpora,*] the jury between the parties aforesaid *is respited* here until the —— day of —— in that year, [*this is to be the return day of the distringas or habeas corpora,*] *unless* —— *shall first (nisi prius)* come on the —— day of —— [*this is to be the first day of the sittings, or the commission day at the assizes,*] at ——, according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear; therefore let the sheriff have the bodies of the said jurors accordingly.

[N. B. *The postea is to be in the usual form.*]

(*c*) Reg. Gen. Hil. T. 4 W. 4, reg. 2, s. 1.

(*d*) *Per* Littledale, J. 3 Car. & P. 163, note (*a*). But great care must be observed not to mislead; and it would be advisable that the pleader should frame such marginal analysis. See *post,* title *Briefs.*

* Teste of the writ of *distringas* or *habeas corpora.*

trial, it is the safest course to state it in the record;(e) for although it has been held that such suggestion may be entered at any time,(f) yet in another case, for want of such suggestion in the nisi prius record, Lord Ellenborough thought that a witness on the trial could not be convicted of perjury;(g) and a form of suggestion of death just before a trial has been given.(h)

Of *Making-up*, and *Passing* the Record.

If the record be grossly imperfect the judge may refuse to try the cause.(i) It is always *made up* by the attorney for the plaintiff in ordinary cases, or by the defendant's attorney when he is about to try by proviso. The proceedings on *passing* the record, so as to be perfectly ready for trial, vary in some respects, and have been very clearly stated in a recent publication.(k) We have seen that it is indispensable, according to ancient rules, that at least an *incipitur of the issue* be *first entered* on an issue roll;(l) and indeed the nisi prius record cannot be sealed or passed until after the issue or an incipitur has been thus entered.(m) Before the record of nisi prius is passed, the distringas, (if the action be in K. B. or Exchequer), or the habeas corpora juratorum, if in C. P., duly returned by the sheriff, and the panel, are to be annexed to the Record, and are to be taken to the marshal's office, and who *will enter the latter for* trial. If *particulars of the plaintiff's demand* or of *defendant's set-off* have been delivered at any time pending the action in any case, then, in pursuance of Reg. Gen. Hil. T. 1 W. 4, reg. 6, a copy of such particulars *must be annexed* to the record before it is entered with the judge's marshal;(n) and we have seen the consequences of annexing a copy not corresponding with the particulars originally delivered.(o) With the aid of such particulars the judge who is to try the cause is better enabled to ascertain the nature of the plaintiff's claim and of the defendant's set-off, whenever the description in the pleadings is so general as to afford no substantial information of what is the nature of the complaint or defence; and in that view the rule requiring such

(e) 8 & 9 W. 3, c. 11, sect. 7.

(f) 1 Burr. 363; 5 Term R. 577; Barnes, 469.

(g) *Rex* v. *Cohen*, 1 Stark. Rep. 511, cited in *Price* v. *James*, 2 Dowl. 435.

(h) See form Chitty's Col. Stat. 2, note (e).

(i) *Rex* v. *Tremaine*, 8 T. R. 590; *Bent* v. *Benyon*, 6 Car. & P. 217.

(k) 1 Arch. Prac. K. B. 4th ed. 304, 305.

(l) *Id. ibid.*, and *id.* 264; and *ante*, 763, 771, 772.

(m) *Ante*, 763, 771, 772.

(n) *Ante*, 613; Reg. Gen. Trin. T. 1 W. 4, reg. 6; Jervis's Rules, 28; and see the decisions, *ante*, 613. That rule appears to extend not only to particulars which are to accompany every declaration in assumpsit or debt, containing an indebitatus count, but to *every particular* of demand or set-off delivered at any time pending an action.

(o) *Ante*, 613.

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particulars is of great utility. These several instruments in K. B. and C. P. constitute the authority and documents upon which each particular cause is tried. In addition to the *general commission* to try all causes in the Exchequer there is also a *particular* commission, authorizing the justices of assize to try each cause depending in that Court.(*p*)

Times and modes of entering the Record.

With respect to the *time of entering* a cause for trial, if it is to be tried in London or Middlesex at any sittings *in term*, it must be entered with the marshal *two days* before the day of sittings; for otherwise the marshal may, at the request of the defendant, enter a ne recipiatur.(*q*) Causes to be tried *after term* should, in strictness, be entered, and the records delivered to the marshal at the times following; viz. the causes in *Middlesex* the first day of the sitting after term, and the causes in London two days before the adjournment day in London;(*r*) but notwithstanding these rules causes are frequently set down for trial, and afterwards entered, before the record is carried in.(*s*)

No occasion for *repassing* a Record.

If the cause be made a remanet, Reg. Gen. Hil. T. 4 W. 4, reg. 18,(*t*) expressly orders, that the *record* need not be *repassed* in either Court; and that if it shall be necessary to amend the day of the teste and return of the *distringas* or *habeas corpora*, or of the clause of *nisi prius*, the same may be done by order of a judge, obtained on an application ex parte.(*u*)

In a *country cause*, the venire, distringas, or habeas corpora, with the panels, particulars of demand, and set-off, are to be in like manner annexed to the record, and the whole taken to the judge's chambers at the circuit town, and there entered with his marshal, *in general* before the first day of sittings of the Court *after* the commission day; but varying in some respects in different circuits or parts of circuits.(*x*)

(*p*) 1 Arch. K. B. 4th ed. 316.

(*q*) Reg. Hil. 15 & 16 Car. 2, reg. 2, K. B.; and Reg. Hil. 32 G. 3, C. P.

(*r*) Reg. Hil. 34 G. 3, reg. 2, K. B.; Reg. Hil. 8 G. 1; Reg. East. 1 G. 2, C. P.

(*s*) *Cope* v. *Holl*, 1 Dowl. & Ryl. 181; 1 Arch. K. B. 4th ed. 316.

(*t*) Jervis's Rules, 92, but it must be *resealed*; and if not, it will be struck out, and not tried, *Waters* v. *Weatherley*, 3 Dowl. 328.

(*u*) *Id. ibid.*; *ante*, 799; 1 Arch. K. B. 4th ed. 316.

(*x*) Chitty's Summary Prac. 176; Reg. Hil. 14 G. 2; Reg. Hil. 32 G. 3; 3 Campb. 365; Tidd, 818; Manning, Exch. App. 222, 223.

CHAPTER XXVI.

OF THE EVIDENCE AND WITNESSES(a) TO BE ADDUCED, AND CONDUCT TOWARDS THE LATTER;—SUBPŒNA DUCES TECUM;—NOTICES TO PRODUCE;—NOTICES OF GROUNDS OF DEFENCE, AND ADMISSIONS, &c.

CHAP. XXVI. EVIDENCE AND WITNESSES.

I. NECESSITY FOR ENQUIRY INTO THE EVIDENCE BEFORE DELIVERY OF THE BRIEF.

I. BEFORE the delivery of the briefs, the attornies for the plaintiff and the defendant respectively must collect, examine, consider,

(a) The treatises and books in which the subject of *evidence* has been principally considered are Trials per Pais; Gilbert's Law of Evidence; 3 Bla. Com. chap. xxiii. p. 367 to 376; Viner's Abridgment; Bacon's Abridgment; and Comyn's Digest titles, Evidence and Tesmoigne; Buller's Law of Nisi Prius; Espinasse's Nisi Prius; Selwyn's Nisi Prius. The modern treatises, Peake's,

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analyze, and arrange the *evidence* to be adduced, as well in support of his own case as in answer to that of the opponent; and indeed we have seen that at least the *substance* of the evidence ought to be ascertained even at much earlier stages of the cause.(*b*) The requisite evidence is always to be considered with reference to, *first, what* must be proved? and *secondly, how?*

II. The Rules of Evidence coeval with, and Part of the Common Law, and modified only by Statutes.

II. There are several *well established rules at common law*, and a few *enactments* relative to *evidence*, which together constitute a distinct branch of law, certainly most important as regards the result of a cause, and of which every student, and still more every practitioner, should at least have a *general* knowledge. Most of the rules are coeval with and parts of the *common law* itself; and it will be found that the few statutes on the subject rather qualify and introduce *exceptions* to the common law rules than create any new rules. The whole might perhaps be stated in a small compass; but the difficulty in applying the rules has induced most authors on the subject to collect *a crowd* of authorities and instances in illustration of each rule, and also to attempt at the same time to describe *rights, injuries,* and *remedies* under each head; and consequently the numerous publications certainly are more bulky than in a scientific view was necessary, though exceedingly

Phillips, Starkie, and Roscoe, are justly of high character. The perspicuous and practical outline in Tidd, 9th edit. chap. xxxv. will also be found useful. It would lead the author beyond the design of this work to attempt to state the whole law on the subject of evidence; at most, an outline can be given, with a statement of the *recent improvements* by statute and rules, and some practical observations. The student and practitioner should examine *all the general rules*, and ascertain the *principles* on which they are founded. A student might do well to form a common-place book, with heads arranged alphabetically, as in Lee's Prac. Dict. tit. Evidence; and from time to time enter every decision under its appropriate head, and increase the number of heads as occasion may arise. It is also submitted, that he should study *physiology*, or at least so much as relates to the *external senses, the mental faculties, the mind, and the causes of deviation from the highest state of intellect to idiotcy or insanity.* A very general knowledge of those subjects will soon convince practitioners how much they would assist him. This study would enable him to make suggestions upon the admissibility or weight of evidence in numerous cases. Thus suppose six witnesses, each equally entitled to credit for veracity, and that all having been present together in a room with one of the parties to the cause, with equal opportunities of hearing what passes, and on a trial one of the six swears that such party used a particular expression, giving the very words, and which are most important to the verdict, but the other five swear positively that no such expression was used—which should the jury believe? Persons who have not fully considered the organs and function of hearing would declare in favour of the five; but others who know the variations in hearing, and the authenticated instances on the subject, will probably decide in favour of the single witness, and such is the practice in law. See per Sir J. Nicholl, in *Tocker* v. *Ayrn*, 3 Phil. Ec. Rep. 541. And see *Rex* v. *Simons*, 6 Car. & P. 540, 541; *Earle* v. *Picken*, 5 Car. & P. 542; *Savage* v. *Brocksopp*, 18 Ves. J. 336, as to the reasons why little reliance on evidence of overheard *conversations* should be placed; and 1 Chitty's Medical Jurisprudence, 302, &c.

(*b*) *Ante*, vol. iii. 118.

useful to practitioners, who naturally seek to find *full directions precisely applicable to their own particular case.* We will now attempt to take a very general view of the rules and statutes on the subject, and then give some practical directions.

III. CONSIDERATIONS RESPECTING EVIDENCE.

What must be proved.

III. The *first* and *principal* question in every cause is, *what* must be proved? Here the maxim has always been, that the parties must recover *secundum allegata et probata*, i. e. according to the pleadings and the proof. The inroad upon the principles of pleadings, by so generally allowing almost any matter of defence to be given in evidence under the general issue, had rendered that rule but rarely applicable; but the excellent recent rules of pleading have in a great measure removed the evil, and restored the practical utility of the rule, excepting in cases where by statute (as in actions against justices of the peace, officers of the customs and excise, and other public officers, &c.) the defendant is still allowed to plead not guilty, and give all the special matter in evidence. We have also seen, that by the excellent Reg. Gen. Hil. Term, 4 W. 4, when a party sues or is sued as assignee of a bankrupt, or executor, or in other representative character, unless the allegation thereof be specially traversed in the pleadings, it need not be proved; a regulation, which will obviously save immense expense in trials, and prevent numerous nonsuits upon mere collateral points, foreign to the real matter in dispute between the parties. As a general rule, every practitioner should carefully examine the *pleadings*, and from which he will now *in most cases* collect *what* he must prove; and if not, he should then obtain advice as to the requisite evidence, unless he can safely rely on his own knowledge and experience. (*c*)

Secondly. Of the *Modes of Proof.*

Of the necessity to produce the best evidence.

With respect to the *modes* of proof, the *first* and principal rule is, that the *best evidence* of which the nature of the case admits must be adduced; and that a party must not attempt to rely on what is termed *secondary evidence*, at least without proving that the former *cannot* be adduced, and *why;* as on account of *actual destruction* of an original deed, or *loss*, after *most diligent search*, and *subpœnaing* every person who is at all likely to have the *best* evidence in his custody or power to

(*c*) The known difficulty *in evidence* has justly led to the practice of allowing to the successful party the expense of a fee to counsel for his opinion *on evidence*, as part of the *costs of the cause;* though in general the expense of all private advice must be borne by the client himself, although successful.

produce the same; (*d*) and even then a jury will sometimes suspect that the best evidence is withheld, and will find a verdict against the party entirely on that account; and, consequently, in adducing *secondary evidence*, the utmost attention must be given to satisfy the jury that there is no suppression of or want of exertion to obtain the best description of proof. (*e*)

Evidence is *first* of *witnesses*, or *secondly*, *written or documentary*.

Evidence, and the rules respecting the same, have always been classed under two principal heads; viz. *first*, *oral* evidence, or the testimony of *Witnesses*, either examined *viva voce* in open Court before the judge and jury, or upon *interrogatories*; and *secondly*, *Written* or *Documentary* evidence.

Who may or not be *Witnesses*.

With respect to *Witnesses*, they are regulated by ancient common law rules, modified by a few statutes. All persons, of whatever religion or country, provided they have competent understanding of the nature and obligation of an oath, and a belief that through the influence of the Almighty, or some supreme authority beyond that of temporal Courts, they would suffer punishment for perjury here or hereafter, are primâ facie *competent* to give evidence; and therefore it has been more usual to consider the *exceptions* to the admissibility of witnesses, and show who are *not competent* to become witnesses, and these are persons,

1. Of *defective understanding*. (*f*)
2. Of *uninformed* mind. (*g*)
3. Of *no religious* principle. (*h*)
4. Or *convicted* of certain crimes. (*i*)
5. Or *directly interested* in the event. (*k*)
6. Or an *husband or wife*, who cannot give evidence against each other, or (*l*)

(*d*) Therefore it is of no avail merely to *serve a third* person, who is a stakeholder, with *notice to* produce a document; but he must be *subpœnaed* to produce the same; *Parry* v. *May*, 1 Mood. & Rob. 279.

(*e*) The law makes no distinction between the *degrees* in *secondary* evidence; and therefore, although the defendant had kept a copy of an original letter, and he served a notice on the plaintiff to produce the original, and it was not produced, the defendant was allowed to give *parol* evidence of the contents of such letter; and it was held that he was not bound to produce the copy. *Brown* v. *Woodman*, 6 Car. & P. 206; and see *Tyson* v. *Kemp*, 6 Car. & P. 71; *The King* v. *Wrangle*, 1 Har. & Wol. 41.

(*f*) These should be subpœnaed unless absolutely and universally insane, *Attorney-General* v. *Parnther*, 3 Bro. C. C. 440.

(*g*) In criminal cases, and perhaps in civil, a trial may be postponed until the intended witness has been sufficiently instructed, 1 Starkie's Evid. 94.

(*h*) As an atheist, 1 Stark. Ev. 17, 22.

(*i*) Restored by pardon, or by having suffered the prescribed punishment, 1 Stark. Evid. 2d edit. 99; 7 & 8 G. 4, c. 28, s. 13; 9 G. 4, c. 32, sect. 3 & 4, except when conviction of perjury or subornation.

(*k*) Usually removed by payment or release. The general rule as to *interest* is the same in England as Scotland, *Ralston* v. *Rowal*, 1 Clark & Fin. 424.

(*l*) *Davis* v. *Dinwoody*, 4 Term R. 678; *Barron* v. *Grillard*, 2 Ves. & B. 166; but a wife's *statement* of her husband's treatment is admissible for defendant in action for crim. con., *Winter* v. *Wrott*, 1 Mood. & Rob. 404, *sed quære*;

7. Persons not allowed to violate *professional confidence.*(*m*) All other persons are *competent*, even the *nearest relation*, as a father, mother, brother, or sister, and of course all other more remote relations; and masters and servants are *competent* witnesses for and against each other; although we have seen that no relation, even beyond the ninth degree, is competent to be a *juror* in any action where his relation is a party.

Documentary evidence is very various; as public and private statutes,(*n*) records, deeds, wills, and an infinity of other written instruments.

Consideration of the objection to a witness on account of *interest.*

There have been two views of the subject of *interest*, which is by far the most frequent and difficult ground of discussion respecting *competency*, viz. *first*, whether a witness ought to be *compelled* to give evidence *contrary* to his own interest; and *secondly*, whether he ought to be *allowed voluntarily* to give evidence in *favour* or support of a cause, in the event of which he is *legally* interested. The doubts on the former question were, to a certain extent, put an end to by the statute 46 Geo. 3, chap. 3, intituled, "an act to *declare* the law with respect to witnesses refusing to answer," and which recites "whereas doubts have arisen whether a witness can by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to any penalty or forfeiture, but the answering of which may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit at the instance of his majesty, or of some other person or persons;" and then enacts, "that a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever, by reason only or on the sole ground that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his majesty, or of any other person or persons." The immediate occasion of that statute was a point which arose on Lord Melville's impeachment, and when the then living autho-

Statute 46 Geo. 3, chap. 3, declaring that a witness shall give evidence *against* his *pecuniary interest.*

and see *Hanson* v. *Lord Kinnaird*, 6 East, 193; 6 Car. & P. 323, note (*a*). So proof of wife's conduct is admissible, *Jones* v. *Thompson*, 6 Car. & P. 415.

(*m*) *Ante*, vol. ii. 21; *Greenough* v. *Gaskell*, 1 Mylne & Keene, 98; *Moore* v. *Tyrrell*, 4 Bar. & Adol. 875 to 878; *Rex* v. *Brewer*, 6 Car. & P. 365; *Mynn* v. *Joliffe*, 1 Mood. & Rob. 226; *Cromack* v. *Heathcote*, 4 J. B. Moore, 357; 2 Brod. & B. 4; *Wordsworth* v. *Hamshaw*, *id.* 5.

(*n*) If an act, private in its nature, be by the usual clause declared public, and to be taken notice of as such, it requires no proof, *Woodward* v. *Cotton*, 1 Crom. M. & R. 44; 6 Car. & P. 401, 491; *id.* 495, note (*a*), overruling other recent decisions to the contrary, as *Beaumont* v. *Mountain*, 4 Moore & Scott, 177.

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rities of the law were nearly divided in opinion, whether a witness was *compellable* to answer a question when a true answer *might prejudice his interest.* It will be observed that the act purports to be *declaratory* of the law, and not as introducing a new rule. And therefore the law of England is to be considered as having *always* established as a rule, that a man shall be compellable to speak the truth at the peril of an indictment for perjury, when the evidence is essential to the administration of justice between other parties, although his evidence might establish against him a *debt* or liability to a *civil* action or proceeding; (*o*) though not so as to accuse himself of a *crime* or expose him to a prosecution for a *penalty* or *forfeiture;* and therefore as well since this act as before, a witness is not compellable to give evidence in proof of what might constitute even a *link* in the chain of evidence against him in proof of a *crime* or *offence,* subjecting him to a *penalty* or punishment. (*p*)

What *interest* will prevent a person from *voluntarily* giving evidence in support of that interest.

With respect to the *exclusion* of the *voluntary* evidence of a witness who is *interested* in the matter in issue, the rule is to allow the witness to swear *against* his interest, *but not in favour of it;* and the law makes no distinction as to the *quantum* or *degree* of interest, for *however small* it may be, yet whilst it continues *unsatisfied, unreleased,* or *not otherwise discharged,* the witness supposed to be influenced by such interest is not allowed, if objected to, to give any evidence on the point. (*q*) But the interest must be a *present, certain, direct,* and *vested* interest, and not uncertain or *contingent;* (*r*) and therefore the heir apparent is competent to support the claim of his father or ancestor, though the remainder-man, having a *vested* interest, is incompetent. (*s*) The difficulty is in the *application* of this rule; of late years the Courts have endeavoured, as far as possible, consistent with the authorities, to let the objection in respect of any supposed interest go to the *credit* rather than to the *competency* of a witness. (*t*)

Many individuals of highly cultivated minds and great legal

(*o*) *Ex parte Chamberlain*, 19 Ves. 483.

(*p*) *Maccallum* v. *Turton, Bart.* 2 Young & J. 183; *Cates* v. *Hardacre*, 3 Taunt. 424.

(*q*) Tidd, 9th ed. 799, cites cases *Rex* v. *Bray*, Rep. T. Hardw. 358; *Abrahams* v. *Bunn*, 4 Burr. 2251; *Bent* v. *Baker*, 3 Term R. 27; *Burton* v. *Hindle*, 5 T. R. 174; *Doe* v. *Tooth*, 3 Young & Jerv. 19; and see per Best, C. J. in *Hovill* v. *Stephenson*, 5 Bing. 497, S. P.

(*r*) *Goodtitle* v. *Welford*, Dougl. 134; *Carter* v. *Pearce*, 1 Term R. 163; *Goss* v. *Tracy*, 1 P. Wms. 287; *Ralston* v. *Rowal*, 1 Clark & Fin. 424.

(*s*) *Smith* v. *Blackham*, Salk. 283. In an action against the vendor of a horse, for the breach of warranty, a prior vendor, who had made a similar warranty, is not a competent witness for defendant without a release, *Biss* v. *Houstain*, 1 Mood. & Rob. 302.

(*t*) Per Lord Mansfield, *Walton* v. *Shelley*, 1 Term Rep. 300; same practice in Courts of equity, *Vaughan* v. *Worral*, 2 Swanston, 399.

attainments have expressed doubts upon the propriety and expediency of such rule utterly excluding the evidence of an *interested* witness, and some have treated it as a rule derogatory and insulting to the character of mankind, as supposing that an individual sufficiently impressed with the obligation of an oath, and believing in a future state of rewards and punishments, according to the veracity of his evidence, will nevertheless be induced, by even a small pecuniary interest, to forswear himself; and therefore they have insisted that the evidence ought to be admissible, subject to observations on the credit to be attached to it. But others, and in particular the late Chief Justice Best, treated such views as too theoretical to impugn a rule of law best adapted to the weakness of the generality of mankind, who, it is supposed, cannot sufficiently controul their inclinations in favour of *their own interest*, and therefore ought not to be subjected to the peril of an indictment for perjury, merely for the sake of establishing a fact in favour of third persons. (*u*)

Certainly, upon another question of *competency*, although we have seen that *relationship or affinity*, even beyond the *ninth* degree, is an insuperable objection to a person acting as a *juror* in any action where his relation (however distant) is a party, whether as plaintiff or defendant, (*x*) yet undoubtedly *relationship*, excepting in the instance of husband and wife, (a particular rule proceeding upon another rule, and established in order to prevent ill feeling between husband and wife,) (*y*) constitutes no objection to the competency of a witness; (*z*) and therefore a father or mother, a brother or a sister, may be compelled or allowed to be a witness for or against his nearest relation, and so on; and yet it is admitted that in fact *prejudices* very frequently influence the evidence of a near relation, *much more strongly* than *pecuniary interest* could effect, and even in a degree that could not be overcome or neutralized by a release as may be a pecuniary interest. (*a*) The relation between husband and wife, from its peculiar nature, and as absorbing the legal existence of the wife, is an absolute bar to the admission of any evidence either for or against each other, excepting for the protection of the wife; for the allowance of the first

(*u*) See observations of Best, C. J., in *Hovill* v. *Stephenson*, 5 Bing. 497, in opposition to the observations in Starkie on Evidence, 1st edit. and see 1 Starkie on Evidence, 2d edit. page 19, 20, 21.

(*x*) *Ante*, 795, 796, in note.

(*y*) *Davis* v. *Dinwoody*, 4 T. R. 678.

(*z*) 2 Hale, 276; Sayer, 45; Co. Lit. 6 b; 1 Hale, 303; Bul. Ni. Pri. 287; Hawk. B. 2, c. 46.

(*a*) See *Hovill* v. *Stephenson*, 5 Bing. 497, 498.

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would induce partiality, and that of the latter provoke dissensions. (*b*)

Exceptions by statute, enabling *interested* witnesses to give evidence. 3 W. & M. c. 11, s. 2. 1 Ann. stat. 1, c. 18. 13 G. 3, c. 78, s. 68, 77. 27 G. 3, c. 29. 54 G. 3, c. 170, s. 9. 55 G. 3, c. 21, s. 22.

Some *exceptions* to the general rule, excluding the testimony of a witness who has even the *smallest interest* in the result of an action or proceeding, have from time to time been introduced by particular statutes; thus 3 W. & M. c. 11, sect. 2, renders admissible the testimony of parishioners, (excepting when almsmen,) against churchwardens or overseers. And by 1 Ann. stat. 1, c. 18, evidence of inhabitants may be taken in prosecutions for not repairing bridges. And the general highway act, 13 Geo. 3, c. 78, s. 68, 77, renders inhabitants of a parish competent witnesses in numerous cases. And 27 Geo. 3, c. 29, renders inhabitants competent witnesses in proceedings for the recovery of penalties given to the parish. The 54 Geo. 3, c. 170, s. 9, enacts, that inhabitants of a parish shall be competent witnesses for and against the parish in questions relating to *rates* or *boundaries*, *orders of removal*, *settlement of the poor*, or the *recovery of any charges* or *maintenance of bastards*, or the *election or appointment of officers*, or the *allowance* of the *accounts* of any parochial or district officer. (*c*) So inhabitants are competent witnesses in questions upon the county rate, under the 55 Geo. 3, c. 51, sect. 22. All which statutes tend to establish that by the common law every pecuniary interest, however small, constitutes an objection to the competency of a witness, although what might be considered a much stronger bias, viz. the wish of a father that his son's action may succeed, constitutes no legal objection whatever to his testimony.

3 & 4 Wm. 4, c. 42, s. 26, 27.

In addition, also, to the foregoing exceptions, the recent act 3 & 4 W. 4, c. 42, sect. 26, 27, introduced a further exception, which on first view might be supposed to be more extensive than it really is. Sect. 26 enacts, "that in order to render the rejection of witnesses on the *ground of interest less frequent*, if any witness shall be objected to as incompetent, *on the ground that the verdict or judgment in the action in which*

(*b*) *Rex* v. *Cliviger*, 2 T. R. 265; 4 T. R. 678; *Rex* v. *Locker*, 5 Esp. R. 107. See other cases and exceptions, 1 Chitty's Crim. Law, 2d ed. 594, 595.

(*c*) As to when a parishioner is a witness, &c., *Doe* v. *Cockell*, 6 Car. & P. 525. In *Slocombe* v. *St. John*, 29 Aug. A. D. 1829, at Croydon Assizes, coram Parke, J.; Serjeant Andrews, Brodrick and Thesiger, for plaintiff; Gurney and Law for defendant; Parke, J. held, that a rated inhabitant was a competent witness to prove whether or not the right of appointment of one of the churchwardens was by custom vested in the minister. But an inhabitant of a parish is not, by this act or otherwise, a witness to prove a supposed right to take gravel or stones from the sea shore to repair parish roads, *Oxenden* v. *Palmer*, 2 Bar. & Adol. 236; *Rex* v. *Bishop Auckland*, 1 Mood. & Rob. 286. And a rated inhabitant is not a witness for the overseer in his defence to an action of a surgeon and apothecary for attendance on paupers, *Tothill* v. *Hooper*, 1 Mood. & Rob. 392.

it shall be proposed to examine him would be admissible in evidence for or against him, such witness shall, nevertheless, be examined; but in that case a verdict or judgment in that action, in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence *for him*, or any one claiming under him; nor shall a verdict or judgment against the party on whose behalf he shall have been examined be admissible in evidence *against him*, or any claiming under him." And sect. 27 enacts, "that the name of every witness objected to, as incompetent on the ground that such verdict or judgment would be admissible in evidence for or against him, shall at the trial be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the Court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined in any subsequent proceeding in which the verdict or judgment shall be offered in evidence."

Decisions on that act.

It has been held that this statute does not make the drawer of an accommodation bill a competent witness for the acceptor without a release. (*d*) So in an action on the case for injuring the plaintiff's wall by digging a cellar near it, it was held that this act did not render a workman, who dug by the defendant's direction, a competent witness, and that a release was requisite. (*e*) And in an action against a carrier for the negligently carrying a package of glass, his servant is not a competent witness without a release. (*f*) So in an action against a person who had hired a gig for negligence in the care of it, a person entrusted by the defendant was not allowed to give evidence without a release. (*g*) Again, in an action for damage done to the plaintiff's horse and cart by the alleged negligent driving of the defendant's servant, such servant is, notwithstanding this act, an incompetent witness without a release; for per Lord Denman, Ch. J. "that statute does not apply; it renders competent those persons for or against whom the verdict or judgment would be evidence; but if this witness says what he is expected to say and is believed, there never can be any action against him, and therefore a release must be given."(*h*)

(*d*) *Burgess* v. *Cuttill*, 6 Car. & P. 282; 1 Mood & R. 315, S. C.

(*e*) *Mitchell* v. *Hunt*, 6 Car. & P. 351, per Patteson, J.; but see the argument of counsel, 4 Nev. & Man. 232.

(*f*) *Harrington* v. *Caswell*, 6 Car. & P. 352.

(*g*) *Heming* v. *English*, 6 Car. & P. 542.

(*h*) *Harding* v. *Cobley*, 6 Car. & P. 664; but *quære* the *reasoning*.

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Examination of witnesses on a *commission* or on *interrogatories* under 1 W. 4, c. 22. (i)

We have already in part considered the great modern improvement as regards the power of obtaining *at law* an examination of a witness who is going abroad on *interrogatories*, or under a *commission* when a witness is already abroad, (k) though not if the witness be in Scotland. (l) The statute 1 & 2 W. 4, c. 22, gives to each of the Courts a compulsory power in this respect. And if there be reasons for apprehending the death of a witness or his inability to attend in consequence of illness, his evidence may and ought to be immediately secured on interrogatories before the master of the Court or a barrister, as is very frequent under a judge's order. (m) But as this statute introduces at law a great boon, therefore the party applying for such examination must in general pay the costs of the proceeding, as was the rule in equity before the statute. (n) The granting a commission to examine a witness abroad is however discretionary, and it will not be granted on the application of a defendant, unless it appear clear that the suggested witness will give material evidence, especially if the witness is at a great distance and the issuing of a commission would occasion considerable delay, unless indeed the money be brought into Court. (o) Nor is a rule for the examination of witnesses on interrogatories in a foreign country an absolute stay of proceedings, but only limited. (p) Nor will the Court compel a party as plaintiff to send out a written document to be produced to a witness abroad. (q) Although a degree of evidence may be secured under this statute, yet there may be many cases in which it would be unwise to dispense with a viva voce examination of the witness in open Court before the judge and jury; and therefore in a late case it was held *that expenses of bringing over witnesses from abroad* (from Barbadoes) and of subsisting them here and of their return, may be allowed at the discretion of the master, subject to the review of the Court, as well since as before the 1 W. 4, c. 22; and Lord Lyndhurst, C. B. observed, "But though proofs merely formal "may be well obtained by that means, it may prove very diffi- "cult to elicit facts on interrogatories which might be obtained "by viva voce examination. The reading of written evidence "produces but a slight impression. Again, a witness if pre-

(i) See in general *ante*, vol. ii. 346 to 348, and 1 Arch. K. B. 4th ed. 296 to 303; and *Stevens* v. *Forster*, 6 Car. & Pa. 289.

(k) *Ante*, vol. ii. 346 to 348; 1 & 2 W. 4, sess. 2, c. 22.

(l) *Wainright* v. *Bland*, 1 Gale, 103.

(m) *Pond* v. *Dimes*, 3 Moore & S. 161; 2 Dowl. 730, S. C.

(n) *Ante*, vol. ii. 346 to 348; 1 & 2 W. 4, sess. 2, c. 22; *Bridges* v. *Fisher*, 1 Bing. N. C. 510; 1 Hodges, 36, S. C.

(o) *Lloyd* v. *Key*, 3 Dowl. 253, and see *Dalton* v. *Lloyd*, 1 Gale, 102.

(p) *Forbes* v. *Wells*, 3 Dowl. 318.

(q) *Cunliffe* v. *Whitehead*, 3 Dowl. 634.

"sent might be able to explain a difficulty unexpectedly arising "in the progress of the cause, or to refute a misrepresenta-"tion."(r) But loss of time to such a witness will not be allowed for.(s)

Thirdly, Other recent improvements relative to witnesses and evidence.

The 11 G. 4 and 1 W. 4, c. 70, sect. 11, authorized the judges to make rules and orders for regulating the proceedings of all the Courts, and under that authority the Reg. Gen. Hil. T. 2 W. 4, were promulgated, and which contain two rules to save the expense of *witnesses* to prove office copies of judgments and other documents. Reg. VI. ordered, "That the "expense of *a witness called only to prove the copy of any "judgment*, writ, or other *public* document, shall not be allowed "in costs, unless the party calling him shall, within a reason-"able time before the trial, have required the adverse party, "by *notice in writing* and production of such copy, to admit "such copy, and unless such adverse party shall have refused "or neglected to make such admission."(t) And Reg. VII. further ordered, "That the expense of a witness called only "to prove the *handwriting to or the execution of any written "instrument* stated upon the pleadings should not be allowed, "unless the adverse party should upon a summons(u) before "a judge, a reasonable time before the trial, (such summons "stating therein the name, description, and place of abode, of "the intended witness,) have neglected or refused to admit, "such handwriting or execution, or unless the judge, upon "attendance before him, *shall indorse* upon such summons that "he does not think it reasonable to require such admission." But those two excellent rules appear to have been virtually superseded by the more extensive practice rules of Hil. Term, 4 W. 4, immediately stated.(v)

Power to the judges to make regulations as to the admission of written documents.

The 3 & 4 W. 4, c. 42, sect. 15, and the rules of Court of Hil. T. 4 W. 4, reg. 20, founded thereon, introduced several important regulations calculated to diminish the expense of adducing evidence on a trial. The statute, sect. 15, after reciting that it was expedient to *lessen the expense of the proof of written or printed documents or copies thereof* on the trial of causes, enacts, "That it shall and may be lawful for the said judges,

(r) *Macalpine* v. *Powles*, 3 Tyr. 871; 2 Dowl. 299, by name of *M'Alpine* v. *Coles*, S. C.

(s) *Id. ibid.*; *Willis* v. *Peckham*, 4 J. B. Moore, 300.

(t) See form of notice suggested in Addenda to Chitty's Summary of Practice, 35.

(u) See suggested form of summons, Chitty's Addenda to Summary of Practice, page 36.

(v) *Post*, 818.

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"or any such eight or more of them as aforesaid, at any time "within five years after this act shall take effect, to make regu-"lations by general rules or orders from time to time, in term "or in vacation, touching the *voluntary admission*, upon an "application for that purpose, at a reasonable time before the "trial, of one party to the other, of all such *written or printed* "*documents or copies* of documents as are intended to be "offered in evidence on the said trial by the party requiring "such admission, and touching *the inspection thereof* before "such admission is made, and touching the costs which may "be incurred by the proof of such documents or copies on the "trial of the cause, in case of the omitting to apply for such "admission, or the not producing of such document or copies "for the purpose of obtaining admission thereof, or of the "refusal to make such admission, as the case may be, and as "to the said judges shall seem meet; and all such rules and "orders shall be binding and obligatory in all Courts of com-"mon law and of the like force as if the provisions therein "contained had been expressly enacted by parliament."

Proceedings requiring *admission of written documents*, or liability to pay costs.

The practice rules of Hil. Term, 4 W. 4, reg. 20, order that "Either party, after plea pleaded and a reasonable time before "trial, may give notice to the other, either in town or country, "in the *form hereunto annexed*, marked *A.* (*x*) or to the like

A.

Prescribed form of notice, and request to admit execution of specified written documents.

(*x*) In the K. B. [*or* "C. P." *or* "Exchequer."] { A. B. *v.* C. D.

Take notice that the { plaintiff / defendant } in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the { defendant, / plaintiff, } his attorney, or agent, at on between the hours of and that the { defendant / plaintiff } will be required to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered, respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause. Dated, &c.

G. H. Attorney for { plaintiff / defendant. }

To E. F. Attorney for { defendant / plaintiff.

[*Here describe the documents, the manner of doing which may be as follows:*]

ORIGINALS.

Description of the Documents.	*Date.*
Deed of Covenant between A. B. and C. D. 1st part, and E. F. 2nd part	1 January, 1828.
Indenture of Lease from A. B. to C. D.	1 February, 1828.

" effect, of his intention to adduce in evidence certain written " or printed documents, and unless the adverse party shall " *consent* by indorsement on such notice within forty-eight " hours *to make the admission specified*, (*y*) the party requiring " such admission may call on the party required, by *summons*, " to show cause before a judge why he should not consent to " such admission, or, in case of refusal, be subject to pay the " costs of proof; and unless the party required shall expressly " consent to make such admission, the judge shall, if he think " the application reasonable, make an order that the costs of " proving any document specified in the notice which shall be " proved at the trial to the satisfaction of the judge or other " presiding officer, certified by his indorsement thereon, shall " be paid by the party so required, *whatever may be the result* " *of the cause*. (*z*) Provided that if the judge shall think the " application unreasonable he shall indorse the summons ac- " cordingly. Provided also that the judge may give such *time* " *for inquiry* or examination of the documents intended to be " offered in evidence, and give such directions for inspection " and examination, and impose such terms upon the party " requiring the admission, as he shall think fit. If the party

ORIGINALS.—(*Continued.*)

Description of the Documents.	*Date.*
Indenture of Release between A. B. and C. D. 1st part, &c. ..	2 February, 1828.
Letter, Defendant to Plaintiff	1 March, 1828.
Policy of Insurance on goods by ship Isabella, on voyage from Oporto to London	3 December, 1827.
Memorandum of agreement between C. D. captain of said ship, and E. F.	1 January, 1828.
Bill of exchange for £100 at three months, drawn by A. B. on and accepted by C. D., indorsed by E. F. and G. H.	1 May, 1829.

COPIES.

Description of Documents.	*Date.*	*Original or Duplicate served, sent, or delivered, when, how, and by whom.*
Register of Baptism of A. B. in the parish of X.	1 January, 1808.	
Letter,—plaintiff to defendant.	1 February, 1828.	Sent by general post, 2 Feb. 1828.
Notice to produce papers. ..	1 March, 1828.	Served 2 March, 1828, on defendant's attorney, by E. F. of ——.
Record of a judgment of the Court of King's Bench in an action, J. S. *v.* J. N. ..	Trinity Term, 10 Geo. IV.	
Letters Patent of King Charles II. in the Rolls Chapel ...	1 January, 1680.	

(*y*) See the form of admissions, T. Chitty's Forms, 130.

(*z*) It will therefore be observed that the rule does not dispense with the usual proof, but merely subjects the party who vexatiously requires it, to the payment of costs.

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"required shall consent to the admission, the judge shall order "the same to be made. No costs of proving any written or "printed document shall be allowed to any party who shall "have adduced the same in evidence on any trial, unless he "shall have given such notice as aforesaid, and the adverse "party shall have refused or neglected to make such admis- "sion, or the judge shall have indorsed upon the summons "that he does not think it reasonable to require it. A judge "may make such order as he may think fit respecting the *costs* "*of the application*, and the costs of the production and "inspection, and in the absence of a special order the same "shall be costs in the cause."

The above rule of Hil. T. 4 W. 4, r. 20, gives a *single judge at chambers*, but not the Court *in banc*, jurisdiction to order the admission of documents; and though at the request of the judge the Court may hear and *report to him their opinions* on a matter of that nature, yet they will not pronounce a formal judgment, but leave the judge afterwards to order as he may think fit. (z) In a recent case an order was made, that on the plaintiff paying the defendant the expenses of examining a judgment and other documents abroad, the defendant should pay the expenses of proving them at the trial, provided such proof should be satisfactory to the judge, and be so certified by him, whatever might be the result of the case, if after such examination the defendant did not admit them. (z) The subscribed orders were drawn up at chambers. (a)

With respect to the practical operation of this rule, Mr. Bagley observes, (b) that "as these regulations have taken effect within a short period, and their practical operation is but partially understood, it may be proper to observe that it is not compulsory in any case on the party intending to produce documents in evidence to adopt the course there pointed out, and that when it is considered unadvisable to inform the opposite party of the nature or contents of the documents proposed to be offered at the trial, the premature disclosure may be avoided, but in that event the cost of proving the document falls inevitably on the party producing it in evidence. On the other hand, when no solid objection exists to putting the adverse party in possession of the nature of the documents proposed to be offered in evidence, and any considerable expense is likely to

(z) *Smith v. Bird and another*, 3 Dowl. 641.

(a) See form of order, 3 Dowl. 645.

(b) Bagley's Chamber Prac. 307 to 309.

be incurred in proving them, it seems judicious in all cases to require their admission in the manner prescribed; for whether the judge shall determine that the required admission is reasonable or unreasonable, the party producing the document in evidence will not be entitled to the costs of proof in any event, unless he has availed himself of the rule. If a judge, upon hearing the parties, intimates his opinion that a document ought to be admitted, the admission is generally assented to; (b) but if it should be refused, the only event in which the party refusing can escape from the obligation to pay the costs incurred in proving the document, is where the party adducing such document has failed to prove it to the satisfaction of the judge presiding at the trial, as testified by the absence of his indorsement on the document. It is altogether in the discretion of the judge, before whom the summons is made returnable, to say when it is reasonable to call for the admission of the document specified; but it is presumed that it would not be considered reasonable to require the admission of any document, when it appeared from the pleadings that the validity of such document was clearly in issue; as where non est factum is pleaded to an action on a specialty, or forgery to an action on a promissory note or bill of exchange; nor does it seem reasonable in general to require an admission of the execution of a private instrument to which the party called upon to admit is in no respect privy. Even in such instances, however, although the judge should be of opinion that it was unreasonable to require the admission, unless the party producing the document applies for its admission in the manner prescribed, he cannot recover the costs of proof, although the issue should be determined in his favour." (c)

It may be added, that when it is expected that fraud or illegality, or other matter of defence arising at the time of executing a deed or other instrument, will come in question, then it may be so important that the attesting witness should attend, that at least one of the parties should secure the attendance of such witness.

IV. PROFESSIONAL CONDUCT TOWARDS WITNESSES, ANTECEDENT TO TRIAL. (d)

IV. As observed by the late Lord Tenterden, "It is of the very greatest importance, as regards the result of a trial, that the *principal attorney himself should, in due time, examine the*

(b) See form of admission, T. Chitty's Forms, 130.

(c) See Bagley's Chamb. Prac. 307 to 309.

(d) See farther in the next chapter on this important part of practice.

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witnesses, and take down the result in writing;" and either the principal or a very experienced clerk, who will afterwards attend at the consultation and to the conduct of the cause at the trial, and who will be above suspicion of tampering with the witnesses, should personally, and in the absence of the client, see and examine each witness apart from the other, so that one may not influence any other as to the *exact* testimony he will give; and he should in particular inquire whether he has any *interest* in the event of the action, or whether there are any circumstances which might affect his *competency* in the opinion of the *judge*, or his *credit* in the estimation of a *jury*, and whether, if there be any objection, it can be removed by release or otherwise. (e) Moreover, if it be a heavy or very important cause, the taxing officer, in the exercise of his discretion, will allow to the successful party the costs reasonably incurred in examining witnesses preparatory to brief, in addition to the common instructions.(f) In the course of this proceeding, any instrument to which the party is supposed to have been an attesting or subscribing witness, may be shown to him, and he may without impropriety be interrogated as to all circumstances relating to the same. "The practice of procuring and examining witnesses is in itself "innocent, and in many cases necessary and meritorious, and "in none disgraceful, whether the employer or the person em-"ployed be considered, and to that extent all the judges have "expressed an unanimous opinion in the Queen's case."(g) And we shall find that even in the Scotch law, where *precognition* of witnesses is considered so objectionable, yet such a *verbal inquiry* of witnesses as to their expected testimony is permitted, because it may be indispensable to a just trial. In the Scotch law, however, it is not permitted to require a witness *himself* to state *in writing*, still less to *subscribe to*, a statement of what he will prove, because it has been supposed that operation might afterwards induce him to adhere to a statement made on a mere ex parte examination, which upon more mature consideration he would doubt. In England it has been the practice to request an *intended witness* to write down *his statement of*

(e) It may also be expedient to ascertain from the witness his age and relationship, or connection, if any, with the plaintiff or defendant, and in some cases whether he is a Churchman or Dissenter, or of what other religious tenets or political opinion, and in general his opinion of the plaintiff or defendant or the case of either. On the trial, if a witness, without objecting to it, take the oath in the *usual* form, he may afterwards be asked whether he think the oath binding *upon his conscience*; but it is unnecessary and irrelevant to ask him if he considers any other form of oath *more binding*, and such question cannot be asked. *The Queen's case*, 2 Brod. & Bing. 284.

(f) See Bills of Costs, page 76.

(g) By all the judges in *The Queen's case*, 2 Brod. & Bing. 302, 306, 307.

the facts to which he will depose, and which might on the trial be produced to the witness, in case he should then vary in his evidence. (*h*) In a late case, where it appeared that the plaintiff's attorney had examined a witness and taken down his statement in writing, and afterwards read it over to him, and he said it was quite correct, and upon the witness giving quite contrary evidence on the trial, the written account was read to the jury, and they found for the plaintiff, four other witnesses having sworn in favour of his claim, the judges (Lord Denman, C. J. and Bolland, B.) made no objection to such proceeding, although they differed in opinion as to the right of the plaintiff to discredit a witness called by himself. (*i*) It seems upon the whole to be the safest course for the *attorney himself to write down* the witness's statement, and just before the trial to read it over to him, and to correct it according to any alteration the witness may then suggest, and to be prepared to produce the same paper on the trial *valeat quantum.* It has also been considered not to be improper to write to a witness, and thereby inform him what is the material point in dispute, as so and so in particular, and then to request him to put down in writing what he knows and has heard the parties say on such and such particular occasions, or at any other time, drawing the attention of the witness only to particular occasions or conversations, but without suggesting the answer to the questions, excepting an intimation that accuracy will be essential.

It has, however, been considered highly improper to administer to the witness *any oath* as to the accuracy of the statement of his evidence before the trial, for although such swearing would be extrajudicial, and therefore not subject the witness to an indictment for perjury, yet still it might impose on the witness an improper bias before he has been duly examined upon the trial. (*k*)

In the *Scotch law* there is much more *jealousy* with respect to any *interference* or *intercourse* with a proposed witness than in England, as will appear from the few authorities referred to in the subscribed note; (*l*) and perhaps the principle of some

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(*h*) *Doe* d. *Smith* v. *Smart*, *post*, 845, n. (*i*); and *Wright* v. *Beckett*, 1 Mood. & Rob. 414. But this is not allowed in the Scotch law, see note (*l*), *post*, 824. And it may well be objected that this proceeding may have the effect of inducing a witness to adhere on the trial to his first *written* statement, although, when examined on his oath in Court for the first time, his statement might differ.

(*i*) *Wright* v. *Beckett*, 1 Mood. & Rob. 414.

(*k*) In *Powlett* v. *Lord Sackville*, for crim. con. tried in Western Circuit, MS. *coram* Garrow, B.

(*l*) In the Scotch law a distinction is taken as regards the pre-examination (there called *precognition*) of a witness in criminal or public prosecutions, and civil or private proceedings; on the former it

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of those rules and objections, such as the objections to showing to a witness the written statement of another witness, or

is permitted, and precognition of a witness, at the instance of a public prosecutor, is clearly no objection to the admissibility of the witnesses; nor will the presence of the conductor of the prosecution, during the examination of the witnesses, be deemed improper.* But in the latest cases, the Scotch Courts have expressed their strong disapprobation of taking *precognition* in *civil* causes,† and the reason of the distinction has been assigned to be, that the peremptory diets of Court, and the accuracy required in laying the indictment, render recognition necessary in *criminal* cases; and as they are taken at the instance of a *public officer*, who cannot have any private interest in the matter, no bad consequences can result. But that such a practice would be both unnecessary and dangerous *in civil actions*, where the pursuer (plaintiff) is allowed considerable latitude, both in forming his libel (declaration) and in leading (conducting) his proof. In such cases, too, precognitions are taken by a party interested in the issue of the cause, in absence of his opponent, in a loose and inaccurate manner; and in these circumstances the persons examined will hazard assertions which they would not have made upon oath, but which they may be afterwards ashamed to retract. The practice, therefore, of taking such precognition, has always been condemned by the Court. And the objection is considered the stronger when the witnesses have been examined in the presence of each other, and have been afterwards shown their declarations, so that even with the best intentions, their after evidence will be biased, and if so inclined they may prove a connected story, the falsehood of which it may be impossible to detect.‡

But if the evidence proffered to be given in a civil suit has been *precognised* before a *justice of the peace*, with reference to some charge of a criminal nature, then it may be admissible.§ However, where a precognition of several witnesses had been so obtained before a justice, with reference to a criminal prosecution, and the pursued abandoned that proceeding, and brought a civil action for damages, and sent to each of the witnesses who had been examined a copy of their own declarations before the justice, together with the declaration of a particular witness, who was considered as the leading one, that they might recollect, as he said, what had passed, when the facts were more recent, the Court unanimously sustained the objection to the admissibility of the witnesses, and declared that although in all cases, even of criminal proceedings, a witness whose depositions has been taken has a right, before he is again examined in Court, to have his previous deposition cancelled; yet that to send, as was here done, the *whole proof* to each witness, was highly unwarrantable, and of the most pernicious tendency, and they rejected the evidence and fined the pursuer £5 for the use of the poor, for his malpractice.‖

In an earlier case it was established, that dealing with a witness after citation, is illegal, as even showing a witness a paper as to what he is to depose, in the absence of the judge, or previously showing him interrogatories upon which he is to be examined,¶ or showing him an unsubscribed rental of lands, whereof the quantity of rent was to be proved, was considered an improper instructing.** If a witness had been *present at consultations in the cause*, he was not admitted to give evidence.†† So if the agent for the person adducing a witness after he has been cited, speak to him on the cause, and mention to him an imputation on his character which had been stated by the other party, this will prevent him from examining such person as his witness.‡‡ So the purposely causing depositions to be shown or read, or proofs sworn or to be given by a witness, to another witness, renders the latter incompetent to give

* *Anderson* v. *Spoval*, 7 June, A. D. 1793, Morrison's Dictionary, vol. xix. No. 208.

† *Wemyss* v. *Wemyss*, 26 Feb. A. D. 1793, Morrison's Dict. vol. xix. No. 207.

‡ *Id. ibid.*; but note only the argument for the defendant, and see reasons in *Fall* v. *Sawers*, 10 Aug. 1785, Morrison's Dict. vol. xix. No. 202; and see *Boyle* v. *Yule*, 4 Aug. A. D. 1778, 19 Morrison's Dict. No. 201.

§ *Wemyss* v. *Wemyss*, *supra*, †.

‖ *Fall* v. *Sawers*, 10 Aug. A. D. 1785, Morrison's Dict. vol. xix. No. 202.

¶ *Geddes* v. *Parkhall and another*, 16 Jan. A. D. 1741, 19 Morrison's Dict. No. 166.

** *Crumstane* v. *Cockburn*, Feb. A. D. 1682, 19 Morrison's Dict. No. 92.

†† *Home* v. *Home*, 5 July, A. D. 1699, 19 Morrison's Dict. No. 116.

‡‡ *Cadell* v. *Morsland and another*, 19 Jan. A.D. 1799, Morrison's Dict. vol. xix. No. 213.

even informing him what another witness will swear, and thereby naturally inducing him to swear to the like effect, might be equally applied to the administration of justice in England.

Every honourable practitioner at all events will take care that no part of his own or his client's intercourse with the witness can possibly have the least influence upon him to give his testimony, otherwise than strictly according to the truth, and without evincing the slightest partiality to either party. Indeed in prudence and policy, this is of the utmost importance to the client's interest, because the *least improper interference* with a witness might so disgust a jury as to induce them to find a verdict against the client, although law and justice might, on the whole, be in his favour.

Previous examination of *Documentary Evidence.*

So with respect to *written* or *documentary evidence*, it will frequently be of the utmost importance for the principal attorney *to examine it with care long before the trial.* (*l*) It has too frequently occurred, that the client has relied upon a statement of written transactions or account books, but which, from some uncommunicated suspicious *alteration* being discovered on the trial for the first time, induces an invincible suspicion of fraud against the client, though in reality the erasure or alteration was

evidence;* though it would be otherwise if they by accident saw the deposition.* But the merely having conversation with a witness relating to a cause after he has been cited, constitutes no objection.†

In the first case, 2 Hale's Pl. Cr. 280, was cited to show that the wilful communication to one witness of what another has sworn, is an insuperable bar to the admissibility of the former.

But it was very early held, that a witness may be asked *what he knows* of the matter, provided no paction be made with him to abide by his information.‡ But a distinction has been taken between obtaining a *verbal* statement of what a witness will swear, and *obtaining a written statement from him, and the latter may render his evidence inadmissible, because it is pledging him to subsequent consistency.*§ But it was holden that a witness was admissible, although while in the service of the party by whom he was adduced, and before his citation, he had drawn up, at his master's desire, and delivered to him a statement of all the particulars which he knew respecting the cause. It was urged in support of the witness, that a party must necessarily inquire of those who are to be cited as witnesses, what they know of the facts connected with the cause. On the other hand it was objected, that the defendant, by giving the witness the information necessary for drawing up the paper, had communicated to him the manner in which he intended to shape his pleadings, and how he expected the evidence of the witness to bear on it. But that the law is so anxious to prevent this knowledge on the part of witnesses, that it is an undoubted objection that a witness has heard another examined, whereas here the witness knows precisely the import of the whole evidence which the defendant means to bring forward. Authorities were cited to establish that point, but the Lords unanimously *repelled the objection.*||

(*l*) This is always essential as regards the *stamp*, *Beckwith* v. *Renner*, 6 Car. & P. 681.

* *Jean Farquharson* v. *Alexander Anderson*, 2 Dec. 1804, by a small majority of the judges, Morrison's Dict. vol. xix. appendix, 2.

† *Id.*; also by a small majority.

‡ Aug. B. 13 Feb. A. D. 1679; 19 Morrison's Dict. A. D. 1786; *Arbuthnot of Knox* v. *The Lady*, 21 July, 1680, 19 Morrison, No. 88.

§ *Ellis* v. *Hamilton*, 16 June, A. D. 1681, 19 Morrison's Dict. No. 89.

|| *Durham* v. *Muis*, 10 Feb. A. D. 1798; Morrison's Dict. No. 211.

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attributable to accident, or the improper conduct of a clerk, and which, if ascertained in time, might have been satisfactorily explained to the jury. (*m*) It seems therefore to result, that an attorney should so inquire and examine into the case and evidence, that he may become master of each, and judiciously decide on the exact evidence he will offer on the trial, and without apprehension of disastrous surprise, be able fearlessly to instruct counsel as to every part of the evidence he thinks it expedient to adduce.

Expediency of adducing even doubtful witnesses or evidence.

When the competency or credibility of a witness is doubtful, the prudent course, when it is expected that his evidence will be favourable, is to subpœna him at all events, because the opponent may perhaps not be aware of the objection, or prepared to substantiate it; and if he be, the reliance upon the objection may create a prejudice against the opponent who has taken it, and the expense of the witness's attendance will probably be allowed. (*n*)

Of endeavours to remove objections to witnesses by *improvements* before the trial.

If it be ascertained that the witness is incompetent from *defect of understanding*, then unless a commission of lunacy has been found, or the bare production of the witness would inevitably lead to a conclusion of incompetency, it may be expedient to subpœna him, and to require that in the meantime a regimen be adopted best calculated to improve the state of his mental faculties. And if it be known that a witness is addicted to intoxication, it is scarcely necessary to suggest that he should be placed under the care of some relative or friend, who will at least secure sobriety and decent conduct in Court. If the incompetency arise from *infancy or defect of education*, and the consequent inadequate knowledge of the obligation of an oath, as there are instances of postponing a criminal trial in order to afford a degree of instruction to a witness in the mean time, perhaps the same principle might be extended to a civil action, and therefore endeavours should be made to delay the trial as long as practicable, and the youth in the mean time placed under the best and most rapid course of education, as well moral as religious.

(*m*) In *Attwood* v. *Smallwood*, in the House of Lords, A. D. 1835, strong observations were made on the probable effect upon a jury of a suspicious alteration in documentary evidence. And in *Stoveld and others* v. *Ellis*, tried at Horsham assizes, A. D. 1820, (an action for a balance of a banking account,) the jury found a verdict against the bankers, merely because there were two erasures on the credit side of the account, when, if it had been known before the trial that the books contained such erasures, their production in evidence might have been avoided.

(*n*) *Rushworth* v. *Wilson*, 1 Bar. & Cres. 267; *Hutchinson* v. *Allock*, 1 Dowl. & Ryl. 146; *Andrews* v. *Thornton*, 8 Bing. 431; as to allowance of expenses, *Benson* v. *Schneider*, 7 Taunt. 337; J. B. Moore, 76.

With respect to persons who have been guilty of a *crime*, the party objecting to his testimony may be required to prove the conviction by the record, and its consequences in excluding his testimony may be removed by proving a *pardon*, or by showing that endurance of the full term of punishment has expiated the consequences of the guilt as regards his *competency* to give evidence.

Readiness to Release.

With respect to the more frequent objection on the ground of *interest*, it must in general be *removed* by a *release*. Sometimes, however, even at nisi prius this may be effected by a *deposit of money*. (*o*) When there is the least apprehension that a release may be required by the client, his attendance at the trial should be secured; and as a general rule, every attorney, as well for a plaintiff as a defendant, should, on attending a trial, have with him a sufficient number of blank releases on proper stamps ready to be immediately filled up and executed. If an attorney promise a release, his engagement will be binding; but although after the witness has given his evidence, he refuse to perform his promise, the Court will not, on that account, grant a new trial. (*p*)

Number of witnesses or *quantity* of evidence.

In what is vulgarly termed "getting up a cause," or "preparing for trial," it is too much to expect of an attorney or counsel, before the trial, his decision that the testimony of any one of *several* witnesses or of *several* documents upon the same point may be dispensed with; and a prudent attorney should subpœna all witnesses and adduce all documents that it is expected will be favourable to his client, leaving it to the discretion of his counsel on the trial to call as many as he may think prudent. Many causes have been lost by calling too many, (*q*) or by giving in evidence more documentary evidence than was requisite; (*r*) but then no blame was imputable to the attorney as it might be were there a *deficiency* of proof. It will be essential also to adopt a judicious *arrangement of the witnesses* in the brief, and under the name of each to give a concise intimation of what reliance may be reposed in him, and in general stating, *first*, the evidence of the best and most important witness; though in proving an ancient right of common or way, or when

(*o*) *Lees* v. *Smith*, 1 Mood. & Rob. 329.

(*p*) *Heming* v. *English*, 6 Car. & P. 542.

(*q*) See the instance of calling a *fifth* witness, supposed to be favourable, but who turned out adverse, *Wright* v. *Beckett*, 1 Mood. & Rob. 414.

(*r*) Thus in a late case on the Home Circuit, by the plaintiff's counsel unnecessarily putting in evidence deeds, instead of relying on a *possessory title*, the plaintiff recovered only a share in the property, in consequence of the deeds disclosing an outstanding term as to the residue.

the witnesses are very numerous, it has been considered advisable *to close* the case with some of the very best witnesses, so as to leave a strong impression on the jury. The master in his discretion may allow for witnesses, although not called on the trial.(*s*)

V. OF THE PRACTICAL PROCEEDINGS TO COMPEL THE APPEARANCE OF WITNESSES.

V. The respective attornies, having determined *what witnesses* to subpœna, and *what documentary* evidence to adduce, should, at least, a reasonable time before the trial, take care to issue such proper process, and adopt such proceedings, as may most effectually secure the attendance of each witness, and the production of all necessary documents; or in default subject him to an attachment or action on the case for the consequences of his omission.(*t*)

Of the subpœna, and subpœna duces tecum.

The process of the superior Courts, requiring a witness to attend on a trial, and the punishment by attachment, existed at common law; and although the 5 Eliz. c. 9, imposed a 10*l.* penalty, and gave further recompense to the party aggrieved, to be assessed by the Court,(*u*) for non-attendance of a witness, and punishment for perjury; yet it is more usual to proceed by attachment, or by action on the case, for non-attendance, or by indictment at common law for perjury, than to proceed upon the statute. It is expedient, however, for a practitioner to examine the enactments in the statute, and in particular the 12th section, which enacts, "that if any person or persons upon whom any process out of any of the Courts of record shall be served, to testify or depose concerning any cause or matter depending in any of the same Courts, and having *tendered unto him or them according to his or their countenance or calling such reasonable sums of money for his or their costs and charges, as having regard to the distance of the place, is necessary to be allowed in that behalf*, do not appear according to the tenor of the said process, having not a lawful and reasonable let or impediment to the contrary, that then the party making default to lose and forfeit for every such offence 10*l.*, and to yield such further recompense to the party grieved as by the discretion of the judge of the Court out of which the said process shall be awarded, according to the loss and hindrance that the party which procured the said process shall sustain by reason of the non-appearance of the said wit-

(*s*) *Adamson v. Noel*, 2 Chitty, R. 200.

(*t*) *Amey v. Long*, 9 East, 473; 1 Camph. 14, *id.* 180; 6 Esp. R. 116, S. C.; *Pearson v. Fletcher*, 5 Esp. Rep. 90.

(*u*) *Pearson v. Iles*, Dougl. 556, 561; Chitty, Col. Stat. 891, *post*.

ness or witnesses; the said several sums to be recovered by the party so grieved against the offender or offenders by action of debt, &c."

Of subpœnaing the witnesses.

In general it is advisable to issue and serve, not only a subpœna *to give evidence*, but also *to produce all documents* in the witness's power, by a *subpœna duces tecum*, and, when practicable, the date and particulars of each deed or document should be stated, so as to preclude the possibility of excuse, that the particular document had escaped recollection; and afterwards the writ may conclude, "and all other deeds, documents, instruments, writings, and papers whatsoever, in your custody or power, that may afford any evidence or information touching the matters in difference in the said cause; and, further, it may be useful *to require the witness* in terms "*diligently to search for and examine and enquire after all such deeds, documents, instruments, papers and writings*;" so that the same may be produced and given in evidence to the jurors at the time and place of trial. This would prevent a not unfrequent excuse, that the witness was not aware that it was his duty *to search*, which, after having been served with so explicit a subpœna, he could not urge.(*v*) If a witness be

(*v*) The following is the usual full form of *subpœna duces tecum*, with the addition of a suggested direction, "diligently to search for documents, &c.:"—

Full form of a *subpœna duces tecum*

To appear and give evidence in an action.

William the Fourth, by the grace of God, of the united kingdom of Great Britain and Ireland king, defender of the faith, to L. M., N. O., &c. [*names of all witnesses included in the subpœna not exceeding four*] greeting: We command you that laying aside all and singular business and excuses you and every of you, be and appear in your proper persons before our right trusty and well beloved [*name of chief justice*] our chief justice assigned to hold pleas in our Court before us [*or in C. P.* "before sir, [*name of chief justice,*] knight, our chief justice of the bench:" *or in Exchequer*, "before sir, [*name of chief baron,*] knight, lord chief baron of our Court of Exchequer at Westminster, at the Guildhall of the city of London," *or in Middlesex*, "at Westminster Hall, in the county of Middlesex," *adding in the Exchequer*, "in the place where our said Court of Exchequer is usually holden," *or at the assizes*, "before our justices assigned to take the assizes in and for the county of ——, at —— in the said county"] on ——, the —— day of —— instant [*or* "next,"] by —— of the clock in the forenoon of the same day, to testify all and singular those things which you, or either of you, know in a certain cause now depending in our Court, before us [*or in C. P.* "before our justices," *or in the Exchequer*, "before the barons of our said Court of Exchequer,"] at Westminster, between A. B., plaintiff, and C. D., defendant, in an action on promises [*or* "of debt," *&c. as the action is*,] on the part of the plaintiff [*or* "defendant,"] and on that day to be tried by a jury of the country; and also that you do diligently and carefully search for, examine, and inquire after, and bring with you, and produce, at the time and place aforesaid, a bill of exchange, dated the —— day of ——, A. D. ——, drawn by —— on ——, and for the payment of £——, two months after the date thereof; And a letter dated, &c. signed by one ——, and addressed to ——, and purporting to contain and be a notice of the dishonour or non-payment of the bill by the said drawee; And a certain instrument, purporting to be an indenture of lease made between A. B. of the one part, and C. D. of the other part, and dated the —— day of ——, 1835; And a certain paper-writing, purporting to be a receipt signed by G. G. for the sum of £——, from one P. P., and dated the —— day of ——, 1835; And [*here describe particularly every other document required to be produced*,] together with all copies, drafts, and vouchers relating to the said documents and letters, and all other documents and paper writings whatsoever that can or may afford any information or evidence in this cause; then and there to testify and show all and singular those things which you or either of you know,

Also to search for and bring with him certain enumerated documents.

served merely with a subpœna *to attend*, he need not search or bring with him any documents, even though he be at the same time served with a notice to produce; (*x*) and hence the general utility of the full form of writ which was established to be proper in a late case. (*y*) However, it is now settled that a subpœna *duces tecum*, without being *ad testificandum*, is sufficient; as a party may be compelled to produce a document without having any right to be *sworn*, *still less examined*, as a witness, or giving the opponent a right to examine or cross examine him. (*z*)

The best course on all occasions would be to issue a subpœna duces tecum in the *fullest form*, and as in the antecedent note; and the names of *four witnesses* are still allowed to be included in one writ; (*a*) although the practice of including several persons as defendants in mesne process when the subsequent declaration is not to be joint has, we have seen, been in a great measure determined. (*b*) The *writ* is then to be engrossed, and is usually on parchment, (*b*) and is to be *signed* by the signer of writs and duly *sealed*; as many copies of such writ are then to be made as there are witnesses named in the writ, not exceeding four; (*c*) and afterwards a *copy* must be served upon each of such witnesses *personally*, and at the same time the original writ, duly signed and sealed, *must be shown* to each witness, whether required or not, and, when necessary, a proper tender for expenses must at the same time be made; for otherwise he will not be liable to an attachment. (*c*)

The *subpœna* must have been *actually issued* before service of the copy; and though it has been supposed that the name of a witness, although not in the original subpœna, may be inserted therein at any time, if he have been regularly served with a copy; (*d*) yet as it is clear that the original subpœna, corresponding with the copy, ought in strictness to be shown to the witness at the time of the service of the copy, whether required by the witness or not, and that if that be omitted, *no attach-*

Statement of consequences of disobedience.

or the said documents, letters, or instruments in writing do import, of and concerning the said cause now depending. And this you, or any of you, shall by no means omit, under the penalty upon each of you of 100*l*. Witness —— [*name of chief justice or chief baron*] at Westminster, the —— day of ——, in the —— year of our reign.

(*x*) *Perry* v. *May*, 1 Mood. & Rob. 279.

(*y*) *Amey* v. *Long*, 9 East, 473; 1 Campb. 14, 180, note (*a*), and next note.

(*z*) *Evans* v. *Mosely*, 2 Crom. & M. 490; 4 Tyr. 169; 2 Dowl. 364; *Rush* v. *Smith*, 1 Crom. M. & R. 94; 2 Dowl. 687, S. C.; *Perry* v. *Gibson*, 1 Adol. & Ell. 48; and *Sowers* v. *Mosely*, Exchequer, S. P.

(*a*) *Wakefield* v. *Gall*, Holt's Cases Ni. Pri. 526.

(*b*) *Ante*, vol. iii. 184.

(*c*) *Jacob* v. *Hungate*, 3 Dowl. 456; *Wadsworth* v. *Marshall*, 3 Tyr. 228; Crom. & M. 87, S. C.

(*d*) *Wakefield* v. *Gall*, Holt's Rep. 526; Tidd, 805, *sed quære*.

ment can be sustained,(*e*) it would be unsafe to rely upon the former supposition. Such copy of the subpœna must be delivered to and left with the witness at the time of the service.(*f*)

Time of serving a subpœna.

Whether a witness be favourable or not, it is always most prudent to subpœna him, or endeavour to do so, as soon as the *issue has been joined*, or at least, on the part of a defendant, as soon as notice of a trial has been given; *first*, because such service will prevent the witness from getting out of the way, and avoiding service; *secondly*, because it will protect the witness from arrest on civil process, and preclude all excuses, excepting dangerous illness, for non attendance; and, *thirdly*, because if such bonâ fide endeavour to serve be ineffectual, the judge, upon an affidavit of such early but unsuccessful endeavours and of the materiality of the witness, would probably postpone the trial on the application of the defendant, which he would refuse if the endeavours were too long delayed. At all events, a witness would have good ground to complain, if he were not served a reasonable time before the trial,(*g*) and perhaps even his disobedience might be excused. In a *Town cause* a bona fide endeavour to serve the witness ought to be made *at least four days before the trial*;(*h*) and a notice in London, served at two o'clock in the afternoon, for a witness to attend the sittings at Westminster on the same afternoon, is much too short.(*i*) In a *Country cause*, the witness, if out of the assize town, must at all events be served *before the commission day*,(*k*) and also before the day of attendance named in the writ; and if the service be afterwards, although before the actual day of trial, and in consequence the witness do not attend, the Court will not grant an attachment.(*l*) At the same time every prudent witness should exert himself and endeavour to attend, however short the notice.(*m*)

The safest course is always to serve a copy of the subpœna, and at the same time to produce and show the original to the witness in the presence of *two* persons, who will afterwards join in an affidavit that the original was produced; for if the witness, in answer to an application for an attachment, should swear that the *original* subpœna was not shown to him, the rule nisi for the attachment might be discharged with costs, and this

(*e*) *Jacob* v. *Hungate*, 3 Dowl. 456; *Wadsworth* v. *Marshall*, 3 Tyr. 228; Crom. & M. 87, S. C.

(*f*) *Thorp* v. *Gisbourne*, 11 Moore, 55; 3 Bing. 225, S. C.

(*g*) *Hammond* v. *Stewart*, 1 Stra. 510.

(*h*) *Postan* v. *Rose*, 4 Car. & P. 271.

(*i*) *Hammond* v. *Stewart*, 1 Stra. 510; *Sims* v. *Kitchen*, 5 Esp. Rep. 46; *Bennett* v. *Jones*, 2 Chitty's Rep. 403; Tidd, 806.

(*k*) *Trist* v. *Johnson*, 1 Mood. & Rob. 259.

(*l*) *Alexander* v. *Dixon*, 1 Bing. 366.

(*m*) *Hammond* v. *Stewart*, 1 Stra. 510; *Sims* v. *Kitchen*, 5 Esp. Rep. 46; *Bennett* v. *Jones*, 2 Chitty's Rep. 403; Tidd, 806.

although it be admitted that the witness did not demand inspection of the original. (*n*)

Amount of sum to be tendered

The statute 5 Eliz. c. 9, sect. 12, we have seen, subjects a witness to an attachment only when *having tendered unto him according to his countenance or calling such reasonable sum of money for his costs and charges as having regard to the distance of the place is necessary to be allowed in that behalf, &c.* (*o*) In a *town cause,* and when the witnesses reside in London or within the bills of mortality, it is the practice to tender only *one shilling* with the subpœna, because it is supposed that a witness in that case may travel the short distance on foot and without expense. In other cases only *a reasonable sum* to cover *travelling expenses to and from* and *expenses at the place of trial* need be tendered; and though it has been customary to allow solicitors, physicians, surgeons, and surveyors a fee for loss of time, yet no *right* to such allowance exists under the statute or otherwise; and it has recently been held that an *attorney,* when merely attending as a *witness,* cannot sue for any compensation *for loss of time;* (*q*) and probably physicians, surgeons, and surveyors are equally bound to attend gratuitously. (*r*) In *country causes,* or where a witness is subpœnaed to attend at any considerable distance, a sum, usually called *conduct money,* varying in amount to the station of the witness and *appropriate mode of travelling,* must be actually produced and tendered sufficient to cover his expenses eundo, morando et redeundo; (*r*) and although a sum has been actually accepted by a witness, yet if it were *too small* no attachment would be issued. (*s*)

Expediency of giving *more particular instructions* to each witness as to the time and place of trial.

It is advisable (though certainly not necessary) to apprize every witness of *the exact day and even hour* when it is expected the cause will be tried, but informing him that the communication *is entirely gratuitous,* and that *at his peril* he must take care and be in attendance according to the terms of the subpœna, and *continue such attendance every day until the cause has been tried* or otherwise disposed of, intimating to him the extraordinary run that sometimes takes place, in antecedent causes going off even to the extent of forty in two or

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(*n*) *Jacob* v. *Hangate,* 3 Dowl. 456; *Wadsworth* v. *Marshall,* 3 Tyr. 228; Crom. & M. 87, S. C.

(*o*) *Ante,* 828.

(*p*) *Jacob* v. *Hangate,* 3 Dowl. 456.

(*q*) *Collins* v. *Godefroy,* 1 Bar. & Adol. 950, 1 Dowl. 326, S. C.; *Willis* v. *Peckham,* 4 J. B. Moore, 300; 1 Brod. & B. 515, even though promised to be paid for loss of time. So *merchants, Moore* v. *Adams,* 5 Maule & Selw. 156; *brokers, Lopes* v. *De Tastet,* 3 Brod. & Bing. 292; 7 Moore, 120, S. C.; and *scientific men, Severn* v. *Olive,* 3 Brod. & Bing. 72; 6 Moore, 235, S. C., are not entitled to any remuneration *for loss of time or contingent losses, Thellusson* v. *Staples,* Dougl. 48; see further, Lee's Prac. Dict. tit. *Witnesses.* A *master of a vessel* is allowed expenses, but not wages, *White* v. *Brayre,* 3 Dowl. 499.

(*r*) *Ashton* v. *Haigh,* 2 Chitty's Rep. 201, cited 3 Dowl. 261.

(*s*) *Dixon* v. *Lee,* 3 Dowl. 259.

three hours. It is further advisable in the evening before the day of trial to deliver to each witness at his residence a *written notice* that the cause will come on the next morning, probaby *very early*, and that he must be precisely punctual at the appointed hour of nine or half past nine o'clock in the morning; and if the cause stand very early, the prudent course will be very early the next morning to send an active clerk to collect and bring every material witness to the Court with him; and as it not unfrequently occurs, especially at Westminster, that the witness gets into the wrong Court, it may be advisable to be very explicit to the witness in that respect, and even particularly to assign to him a place in the proper Court; and at the assizes some particular inn or place of rendezvous at the circuit town on the evening before or at an early hour before that appointed for the sitting of the Court should be named. It is, however, no excuse for non-attendance, that a person whom the witness instructed to watch the proceedings neglected to give him notice in due time. (*t*)

When an officer of the Court or a banker or other person is served with a subpœna to produce some official or other document in his custody, and it be also intended to require *him* on the trial to give some parol evidence as to the practice in the office or respecting the custom of bankers or of trade, &c., then the witness so subpœnaed should be *particularly informed as to the latter*, not only that he may be better prepared to speak on the subject, but also that he may not, as frequently occurs, merely send *his clerk* or partner with the documents; for if the witness be not so informed, the Court will not grant an attachment on account of his not attending in person. (*u*) Whatever may be the liabilities of a witness, the interest of the client will be best observed by endeavouring to secure the attendance of the witness even by extra attention and trouble.

As a plaintiff is bound to have his witnesses in attendance in Court *at and from the commencement of the assizes*, without regard to the order in which his action may stand for trial in the cause paper, he is therefore entitled to the costs of their attendance from the evening before the first day of trial, and he should therefore take care to be secure of the attendance of the witnesses on that evening, and at the assizes to attend him at a named inn in the circuit town, before a named hour, stating at the foot of the copy of subpœna such his temporary residence during the assizes; (*v*) at least the propriety of the

(*t*) *Rex* v. *Fenn*, 3 Dowl. 546.

(*u*) *Bennett* v. *Jones*, 3 Chitty's R. 403.

(*v*) *Cosgrave* v. *Evans*, 2 Dowl. 443; *Platt* v. *Green*, *id.* 216, S. C.

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attendance of the witnesses before the very first day is in the discretion of the master.(x)

It has been held, on a rule for an attachment for not obeying a subpœna to attend as a witness, that it must appear that the party was called in Court on his subpœna; (y) and if he were so called, still if he was too ill to attend, that will be sufficient excuse. (y) But in a subsequent case, where upon a motion for an attachment an affidavit was produced stating that the witness was called three times in open Court, this was holden sufficient without alleging that he was called upon the subpœna; (z) and in another case it was held that a witness is guilty of contempt by not attending though the cause is not called on. (a) And a plaintiff's counsel has a right, before the jury is sworn, to have the witnesses called on their subpœna. (b) An action may be maintained if in consequence of the non attendance of the witness the plaintiff's attorney be obliged to withdraw the record, though the plaintiff be not nonsuited. (c)

If by an alteration in the state of the pleadings after notice of trial, (as by a judge giving leave to a defendant to withdraw his pleas of justification in an action for a libel,) certain witnesses have become unnecessary, the party who subpœnaed them must take the earliest means to *countermand* the attendance of such witnesses, or the expense of them will not be allowed as costs in the cause. (d) If the cause be made a remanet, the original subpœna must be resealed, and a fresh copy thereof again served. (e)

In all cases an attachment must be moved for in the following term, and not afterwards; (f) and unless it clearly appear from the affidavits that the evidence of the witness would have been material, no attachment will be granted against him for his non attendance. (g)

VI. OF NOTICES TO PRODUCE.

VI. A *notice to produce* is only proper when a document is supposed to be in the possession of the *party to the cause*, or of *his attorney or agent entirely for such party's use;* for if the document be in a third person's possession, even as a stake-

(x) *Platt* v. *Green*, 2 Dowl. 216.
(y) *In re Jacobs*, 1 Harr. & Wol. 123; 1 Mood. & Mal. 115.
(z) *Dixon* v. *Lee*, 3 Dowl. 259; *Rex* v. *Fenn*, id. 546.
(a) *Barrow* v. *Humphreys*, 3 Bar. & Ald. 800, 598, cited by Parke, B. in 3 Dowl. 259.
(b) *Hopper* v. *Smith*, 1 M. & M. 115.
(c) *Mullett* v. *Hunt*, 3 Tyr. 875; 1 Crom. & M. 752.
(d) *Allport* v. *Baldwin*, 2 Dowl. 599.
(e) Tidd, 805, note (m); 1 Arch. K. B. 4th ed. 292.
(f) *Thorpe* v. *Gisborne*, 3 Bing. 223; 11 Moore, 55, S. C.
(g) *Dicas* v. *Lawson*, 3 Dowl. 427; *Dicas* v. *Lord Brougham*, 1 Gale, 14.
(h) See in general 1 Arch. K. B. 4th ed. 289. *Quære*, if a *subpœna duces tecum* even to a party in a cause, and at all events to his attorney, might not be of utility since the decisions, *ante*, 830, n. (z).

holder, a notice to produce to him would be of no avail, and he must be served with a subpœna duces tecum; (i) and if the attorney of the party have possession of a document, and claims *a lien or any interest on his own behalf*, the safest course is to *subpœna* him to produce the same.

As part of the general rule, that the *best evidence* must be adduced, it is an established rule not to admit *secondary evidence*; as, for instance, the production of a copy without proving that due means have been adopted to endeavour to obtain the production in Court of the original. Consequently when the opponent has in his possession or power *an original document*, a *written notice* must be served upon him in due time to produce the same, for otherwise a copy cannot be read in evidence; (k) and it must also be proved that the opponent *last* had the possession of the original, and that he was served with the notice to produce, a *reasonable* time before the trial; therefore a notice requiring a defendant to produce a lease served upon the wife of the defendant's attorney at his lodging in the evening before the day of trial, is too short. (l) So at the assizes, a notice to produce, served in the assize town, is too late. (m) But if a party himself be abroad, a notice served on the 13th of December, between 5 and 6 in the afternoon, upon his attorney, to produce documents at the trial to be on the 15th December, is sufficient, because it is to be supposed that a client going abroad will leave all his documents in the possession of his attorney. (n)

With respect to the *requisites* or terms of a notice to produce it should *particularize every document* as fully as possible, for a notice to produce "all letters, &c." without stating dates or extracts to bring the opponent's recollection to those required has been considered *too general*. (o) It is advisable to state the *dates* and *some particulars* of each document and letter, the same as in the preceding form of subpœna duces tecum, (p) especially when the terms of the letter are favourable to the party giving the notice; for the very reading of the notice in Court to the jury may lead to an inference in favour of the party giving the notice, even though the letter or document be not produced. It is recommended also that a notice to pro-

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(i) *Parry* v. *May*, 1 Mood. & Rob. 279, *ante*.

(k) *Bate* v. *Kinsey*, 1 Crom. M. & Ros. 38; *Doe* v. *Morris*, 4 Nev. & Man. 598.

(l) *Doe* d. *Wartney* v. *Grey*, Stark. R. 283; *Sims* v. *Kitchen*, 5 Esp. R. 46; *Bennett* v. *Jones*, 2 Chitty's Rep. 495.

(m) *Bryan* v. *Wagstaffe*, 2 Car. & P. 127.

(n) *Bryan* v. *Wagstaffe*, 2 Car. & P. 126; Tidd, 803.

(o) *Jones* v. *Edwards*, M'Clel. & Young, 139.

(p) *Ante*, 829, note (u).

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duce require the opponent to *search for* as well as to *produce*, as in the subscribed form. (*p*)

The proof of the service of the notice to produce must afterwards be followed by evidence that the opponent had and probably still has possession of the document and wilfully withholds it. These proceedings are essential, as it has been settled that an instrument which has been traced to the hands of an opposite party can in no case be presumed to have been lost or destroyed, unless such party has had notice to produce it. (*q*) However, in an action on an attorney's bill, it is not necessary to give notice to produce the original bill delivered to the party, but the production of a duplicate thereof is sufficient, because in this case both are originals; nor is it necessary that the parties examining the original delivered with the duplicate should have read the two bills alternately. (*r*)

VII. OF NOTICES OF INTENDED DEFENCE, OR TO PROVE CONSIDERATION.

VII. Before the late pleading rules, which now require almost all matters of defence to be pleaded specially, it was considered prudent and proper for a defendant to serve the plaintiff, a reasonable time before the trial, with *a notice of the*

Notice on behalf of a defendant to produce bills, notes, checks, books, letters, &c. stating the dates and particulars as far as practicable.

(*p*) In the King's Bench, [*or* " C. P." *or* " Exchequer of Pleas."]

Between { A. B. plaintiff, and C. D. defendant.

You are hereby required diligently to search for and produce to the Court and jury on the trial of this cause a bill of exchange, dated the —— day of ———, A. D. ——, drawn by the plaintiff upon and accepted by the defendant for the sum of £——, payable to the order of the plaintiff at ——, after the date thereof, and by him indorsed; *and also a certain letter* addressed to the said defendant, and dated, &c., and purporting to contain notice of the nonpayment of a bill of exchange for the sum of £——, dated the —— day of ———, and drawn [*or* " indorsed"] by the defendant, and which became due on, &c. [*then state the dates and particulars of every other document as far as practicable, and then proceed as follows:*]—and all other bills of exchange drawn by the plaintiff upon and accepted by the defendant; and also all bills of exchange drawn by the defendant upon and accepted by the plaintiff; and all bills of exchange indorsed by the plaintiff or by the defendant; and all promissory notes, made or indorsed by the defendant and payable to or indorsed to the plaintiff, and all checks drawn by the plaintiff or the defendant upon certain bankers in, or bearing date in, the month of ———, A. D. ——, or at any time since; and also all day books, waste books, bankers' books, bill books, ledgers, and all and singular other the book and books of account of the said defendant, papers and documents whatsoever, wherein are entered or contained any entry of any transaction, or dealing, or fact relating to the said bills of exchange, promissory notes, and checks; and all letters, notices, papers, and documents, containing any notice of the nonacceptance, nonpayment, or dishonour of the said bills of exchange, promissory notes, and checks, or either of them, or otherwise relating thereto; and all documents whatsoever tending to prove that the defendant received no value or consideration for his becoming a party to the bill of exchange mentioned in the declaration, and that the plaintiff knew the same, and that the plaintiff gave no value or consideration for the same bill. Dated this —— day of ———, A. D. 1835.

Yours, &c. Y. Z.
Defendant's attorney.

To Mr. ——, the above-named plaintiff,
and to Mr. ——, his attorney.

(*q*) *Doe* v. *Morris*, 4 Nev. & Man. 598.

(*r*) *Fyson* v. *Kemp*, 6 Car. & P. 71.

intended defence, where it might otherwise, on the trial, take the plaintiff by surprise, in which case if such notice had not been given, the Court would more readily set aside a nonsuit or grant a new trial, when the verdict was against the plaintiff, upon the objection which had taken him by surprise. The practice of giving notice of the defence of infancy and other matter, peculiarly within the knowledge of the defendant, was particularly recommended by Lord Mansfied and afterwards by Lord Ellenborough, who also extended the practice to defences in an action on a bill or note, on the ground of the want of consideration. (*s*) So where it is intended on a trial to endeavour to defeat or reduce a plaintiff's claim, on account of the inferiority of goods sold to the representation or warranted sample, or the insufficiency of work and materials, or negligence in the conduct of an action or defence in answer to an attorney's bill, it was considered fair, if not requisite, to serve a written notice of such defence. (*t*) But whenever, since the new rules, the plea has distinctly given notice to the opponent of the ground of defence, there cannot in general be occasion for a collateral notice of that description, unless in answer to an application for more particular information, and which should not in any case be withheld. However, when the plea is general, that the goods or materials were defective, a written notice, as in the subscribed form, may still be useful. (*u*)

VIII. Of admissions.

VIII. It is most proper and commendable to save useless trouble and expense by an interchange of very candid admis-

(*s*) See a form of notice to prove consideration, Chitty on Bills, 8th ed. 778, 779.

(*t*) *Basten* v. *Butter*, 7 East, 479.

(*u*) See *Basten* v. *Butter*, 7 East, 479. The form of notice may be thus:—

Notice that on the trial defendant will insist that plaintiff's work and materials were insufficient.

In the ———,

Between { A. B., plaintiff, and C. D., defendant.

Take notice that on the trial of this cause the defendant will insist, that in case the plaintiff should prove that certain works and materials were done, and performed, and provided as by him alleged, then the defendant will insist and prove that the same were done and performed inartificially and in a bad and unworkmanlike manner, and that such materials were improper and inferior, and of much less value than the prices charged for the same, and that the defendant will claim and insist that deductions and allowances from the prices claimed ought on that account to be made, and in particular the subscribed list or statement of imperfections will be insisted on, besides other considerable defects and insufficiencies throughout the whole of the works and materials of the plaintiff to which this act relates. Dated the —— day of ———, A. D. 1835.

To Mr. J. K.
Attorney for the plaintiff.

Yours, &c. E. F.
Attorney for the defendant.

[*Subscribe a schedule of defects or deficiencies*]

sion of all facts known to exist; (x) but at the same time it is essential, before agreeing to admissions, to proceed with considerable caution; for instance, no admission of the execution of a deed or other instrument should be made by a defendant when it is important that it should be proved by the production of a witness, who must, on cross examination, admit some facts favourable to the party required to make the admissions, as in the case of fraud, gaming, usury, &c.; for then the admission would relieve the opponent from the necessity for producing the witness; and subject the defendant to the trouble and expense of subpœnaing him; besides, the difference in the mode of examining the witness, which in general may be more leading in case of a cross examination than in an examination in chief. In actions for personal injuries, as to the absolute or relative rights of persons, it is not advisable for the plaintiff unnecessarily to require or accept any admissions, because the appearance of candour on the part of a defendant may predispose a jury in his favour. If cross admissions are to be made, the plaintiff's attorney should in general require those in favour of the defendant to be distinct from, and not qualify the admissions in favour of the plaintiff, so as to compel the defendant to read the admissions in his favour as part of *his* case, without clogging or qualifying that of the plaintiff.

(x) See a form of *admission* under Reg. Gen. Hil. Term, 4 W. 4, T. Chitty's Forms, 130, 2d edit.

CHAPTER XXVII.

OF PREPARING FOR TRIAL, AND FINAL EXAMINATION OF THE EVIDENCE AND WITNESSES, AND DIRECTING THEIR CONDUCT.(a)

CH. XXVII. FINAL EXAMINATION OF WITNESSES, &c.

1. How evidence and witnesses to be examined, and consequent utility.

THERE is no stage in a suit in which the zeal and ability of an attorney can be so efficiently evinced as in that of *preparing for trial or hearing*. At *Law* he has not only to prepare the *brief*, but must previously, with the utmost care, *collect*, *examine*, *condense*, and *arrange* the *Evidence*. In *Equity* he has to prepare the *Brief* relating to the pleadings or depositions in due order, and then give a compact and faithful analysis of all the material facts and points, and occasionally introduce appropriate observations, as well upon the *facts* as upon the *law and equity* applicable to the case.

At *Law* a formal and *full examination* of the *Evidence*, and particularly of the *Witnesses*, should at all events be effected on the behalf of a *Plaintiff* immediately after issue joined, and even before giving notice of trial, so as perfectly to ascertain whether the plaintiff can safely proceed to trial before the expenses incident to the delivery of notice of trial, and the de-

(a) Many of the observations in the following pages, particularly as regards the examination of witnesses previously to the trial, will be found anticipated in the parts of the last chapter relative to witnesses. The importance of the subject, the author hopes, may excuse some repetitions in the present chapter.

CH. XXVII. Final Examination of Witnesses, &c.

fendant's proceeding thereon, have been incurred. (*b*) On the part of a *Defendant*, his evidence and witnesses should, if not before, at least be examined immediately after *receiving notice* of trial, as the costs of that proceeding will then be allowed against the plaintiff in case *he* should not try pursuant to his notice. The slovenly manner in which the expected evidence of witnesses is sometimes obtained, as well as stated in the brief, is extremely derogatory to the character of the profession, baneful to the client, and deserving of the strongest censure; many failures, whether in an action or defence, are entirely occasioned by culpable negligence in this respect. The deliberate statement of the client himself, whether verbal or in writing, as well of the facts as of the evidence he expects each witness will give, should undoubtedly be obtained as instructions for further inquiries, and *to assist* in preparing the brief and in examining the evidence, and generally in preparing for trial; but too many practitioners rely entirely on that information, though such negligence would subject them to an action for the consequences of their inattention. (*c*) The principal attorney, or a very intelligent clerk, who it is expected will afterwards attend at the consultation and trial, and be complete master of the facts and points, and proofs in support of them, should, just before the trial, again *himself personally* examine each witness *separately*, as well as to his *character, relationship*, or *interest*, as respecting the *exact testimony* he will give, and such examination should be deliberate, separate, and in private, *always excluding the client*, because he is too apt to interfere and *suggest* evidence to the witness, and who will at the time readily assent to the statement, though afterwards, when giving his evidence under the influence of his oath, will frequently vary materially from the former conceded statement, and will either contradict or materially qualify the same, and will consequently, as it is technically termed, *break down* on the trial, and thereby not unfrequently occasion a disastrous defeat. The client and the witnesses should also be respectively cautioned against any such conversation with each other upon the subject of the cause, that might afterwards be termed *tutoring* the witness. Again, in personally examining the witness, *leading questions* should not be put to him that would suggest or indicate a desire to have any precise negative

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(*b*) It has been shown, *ante*, this volume, 117, 118, that a prudent attorney should examine the evidence and the principal witnesses, even before the commencement of an action.

(*c*) *Ante*, vol. iii. 118; *Cliffe* v. *Roper*, 2 Dowl. 21.

or affirmative answer, but the questions should be so stated as merely to elicit the truth with every qualifying fact, and to ascertain that the witness knows the facts, as it is technically termed, *of his own knowledge*, and *not of hearsay*, and the *ground* of such knowledge, as *why* he thinks the facts to be as he has stated, or by what circumstances he is enabled to remember the precise day or hour or place when a fact occurred; and he should be cautioned against stating any facts which he has merely *heard of* from others, without *himself* having *seen the* transaction, or, in other words, constituting what is termed *hearsay evidence*. All the questions and the answers should be taken down *in writing* by the attorney who examines the witness. In all communication with witnesses, especially when in inferior departments, the proper eliciting questions should be put with the utmost care, to avoid the remotest hints upon the point that the client may wish to prove or disprove, or what is termed *leading questions*, such for instance as asking whether A.B. *did not say so and so*, or any question so shaped as even indirectly to suggest to the witness the wish to obtain any particular answer, because many inconsiderate persons too readily answer according to mere hasty impressions, and having once made a representation, might afterwards, for the sake of appearing consistent, improperly adhere to such extra-judicial statements. The least supposition that a witness has been *improperly tutored*, will in general disgust the judge and jury, and be disastrous to the interests of the client. A witness, however, who is to prove a conversation, may be instructed in one respect as to the mode of giving his testimony, as to state the *very words* used on the occasion, and not merely what he may deem a just inference or substantial result of a conversation; thus even a professional witness will not unfrequently swear that the defendant *admitted the debt*, without stating the very words the defendant used, and incur the displeasure of the judge for that improper mode of giving evidence. In the previous chapter we considered the conduct that a practitioner may observe towards a witness, in ascertaining the evidence he can give, and reference to those observations is requested; indeed, upon this important subject, many of the observations in this chapter may be deemed, it is hoped, pardonable repetitions.

If time will allow (and the contrary should never be attributable to the indolence or inattention of the attorney) it would be even advisable, very shortly before the trial, *to show to the witness the previous account of his evidence*, and to request him privately and deliberately to consider whether he is still posi-

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tive that the account is accurate, and to correct or qualify the statement when incorrect, or even doubtful. (*d*) And there would perhaps be no objection to inform him that others have made different statements, without stating *who* or *what*, but it would be incorrect to show him the statement of evidence that will be given by other witnesses, especially if tending to confirm his own statement. (*e*)

After this proceeding with every witness, and after the testimony of all has been thus obtained, the statements should be compared with each other, so as to ascertain whether there are any discrepancies, the nature and extent of which must be faithfully pointed out in the brief, so that counsel may endeavour to avoid calling any one witness who might materially vary from others more favourable. (*f*)

2. Releasing or removing the *interest* of witnesses.

2. It is scarcely requisite to suggest the necessity of ascertaining whether the witness is *legally interested* in the result, either *as bail* for the defendant in the action *or otherwise;* and in due time to remove the objection, either by obtaining another bail in lieu, (*g*) or in certain cases by his bonâ fide and absolutely assigning or parting with the debt which constituted the ground of objection. (*h*) It is true that the recent statute, 3 & 4 W. 4, c. 42, sect. 26, removes the objection to a witness on the mere ground that the verdict or the judgment in the pending action would be admissible for or against him; but

(*d*) According to the case of *Wright Beckett*, 1 Mood. & Rob. 415, and *ante*, 823, this may not be objectionable, though it may be advisable not to deliver to a witness a *leading* statement of his evidence, suggesting to him what it is supposed he will swear, still less to pledge him to a statement written by himself.

(*e*) *Semble*, it is so in the Scotch law, *ante*, 824, note (*l*).

(*f*) As in *Wright* v. *Beckett*, 1 Mood. & Rob. 414, *ante*, 823, and *post*, 845. It is a well authenticated anecdote, that an eminent attorney, and whose integrity was never doubted, upon being questioned by the then chief justice of the Court of Common Pleas, Sir James Mansfield, how it was that his witnesses always appeared so intelligent, and his success so uniform? replied, "Why, my lord, you would be astonished what *dolts* my witnesses frequently are before the trial, but how intelligent they become after I have *personally examined them* and informed them of their *duties* in giving their testimony, and which I believe will account for my success. Moreover I never try a cause, when from such my *own* examination of a witness I anticipate a defeat."

(*g*) Such change of bail may be effected by summons and judge's order at any time before or even pending the trial. See *Bailey* v. *Hole*, 1 Moody & M. 280; 3 Car. & P. 560, S. C.; in that case Lord Tenterden made an order for striking the name of one of the bail out of the bail piece, on the defendant's immediately paying to the associate 40*l.*, the sum sworn to, and 50*l.* for costs, and the prior evidence of the witness stood, and his cross-examination proceeded; and see *Young* v. *Wood*, Barnes, 69; Bing. 92. In *Anonymous*, 2 Chitty's Rep. 103, on motion and rule nisi, one of the bail was struck out of bail piece, on affidavit of plaintiff having discovered that he was a material witness, and another bail justified in lieu.

(*h*) This must be done without reserve, and without the witness in any way guaranteeing any proceeds, or being responsible in any way for the purchase-money, &c. To avoid stamps, it may be verbal.

that enactment is but of limited operation; besides, if it were otherwise, still, by actually extinguishing all interest, the effect of counsel's observations on his *credibility* would be removed. If the interest cannot be otherwise removed, then, according to the circumstances, the intended witness must either give or receive a *release* in proper terms, sufficiently comprehensive, and either general or special; and this must be executed by all proper parties, and it must be bonâ fide understood that it is absolutely given, without any understanding, still less stipulation, not to take advantage of such release, so that the witness may be able to swear accordingly; for otherwise, as too frequently the case, the jury may suspect that the release has been given merely *pro tempore*, and that the interest still subsists, and will influence his testimony. But the inquiry should not stop here; for it will be advisable to ascertain every circumstance respecting the witness in connexion with the cause, or otherwise, that might either conduce to or derogate from his credit in the estimation of a jury, and to communicate the same fully in the brief. It is extraordinary what small circumstances will influence the jury in this respect.

3. Consideration of the *character* and *temperament* of each witness.

3. The quality, age, education, understanding, general behaviour, and inclination of each witness, as it may affect his expected evidence, and the credit that may probably be given to it, should be well ascertained, and afterwards concisely stated immediately under his name, in the right hand margin, or if long, then immediately under the statement of his proposed testimony, and occasionally with hints as to the best mode of examination of this or that particular witness, as presently suggested. By adopting this course, defeats, too frequently arising from calling witnesses unexpectedly adverse, or from an *inappropriate* mode of examining a favourable or adverse witness, may be avoided.

4. *Instructions* or *directions* to witnesses when or not proper.

4. Though the *criminal* impropriety of *tutoring* a witness, so as to induce him to alter the *substance* of his testimony, is too obvious to require observation, yet there are certain points against which every witness may *with propriety be cautioned;* and which interference should in certain cases take place, as well with reference to the respect to be paid to the judge as to prevent annoyance to the witness, and especially injury to the cause; and which will be cautions rather *against improprieties of demeanor* than tending to any deviation from truth. Thus some witnesses require to be cautioned upon the necessity for

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due *respect* towards the judge, and to observe an erect but easy posture, without even the semblance of an attitude of defiance on the one hand, or of indifference or non-chalance or flippancy on the other. His voice should be pitched with reference to the size of the Court, and the propinquity of the judge and the jury, and neither ridiculously too high, nor distressingly too low. He should direct his voice, in giving his answers to questions, if practicable, as well towards the judge as the jury, and *not* towards the questioning advocate, if the so doing would throw his voice in another direction than towards the judge and jury. This is exceedingly important, though frequently very difficult to observe, in consequence of the inconvenient structure of the Court. But if not observed, the judge may have the trouble of continually directing the witness so to act, lest the jury should not hear his testimony; and if he should continue to follow the natural propensity, to direct his voice towards the part of the Court from which the questions proceeded, the judge may be annoyed and displeased. Many witnesses also require to be particularly instructed *to give short and exact answers only to the questions put to them*, and not to indulge in a long narrative, unless particularly requested; and then to state only matters that occurred in his own presence and hearing, and not what he heard from others; but at the same time he should be informed, that as he is sworn to speak the whole truth he may and should, after the plaintiff's and defendant's counsel have finished their examinations and cross-examinations, respectfully ask the judge to be allowed to state any additional facts which he may think are material to be added in speaking the *whole* truth; for want of this caution it very frequently happens that very important facts are not disclosed in consequence of the present practice of confining the witness to mere answers to certain questions, to avoid loss of time, by a long ill-arranged narrative, much of which might be irrelevant or immaterial. He should also be particularly cautioned against any expression or manner which would evince a party feeling or interest, in which it would be improper to indulge when speaking under the solemn obligation of an oath. He should also be reminded, especially if of an irascible disposition, that the counsel when cross-examining him is performing a necessary duty to endeavour to elicit truth; and that it may probably be the duty of such counsel to become seemingly personal and offensive; and that whatever may be the tone or manner in which the counsel may address him he should not become irritated, but answer in the same

tone and manner, as if he were the counsel of the party on whose behalf the witness attends; and that however provoked (even as he conceives unjustly and improperly,) at most he should only address the judge for protection, and that only upon the clearest necessity; for otherwise he would only expose himself to ridicule, and even reprimand, for not properly answering the questions, which would perhaps be as injurious to his own character or feelings as to the party in whose favour his evidence was given. On the other hand, a timid witness may with propriety be impressed with the moral obligation to speak out firmly the facts according to the best of his recollection, so that he may in observance of his oath speak the *whole* truth.

5. Conduct of witnesses just before the trial.

5. It may be of considerable importance that witnesses, especially females, unaccustomed to courts of justice, should for a day or two, or at least a few hours, before the expected trial, attend the Court, so that by their observance of the demeanor of others they may be better prepared to overcome the sensation of alarm which would otherwise frequently incapacitate them from giving their evidence in a proper manner.

6. Conduct pending and after the trial.

6. In causes where political or local prejudices may be excited by the course of trial, it may be of the utmost consequence, and highly important, *to caution* as well the client as all his witnesses against the least expression, even momentary, of exultation at a particular seeming advantage pending the cause, or in consequence of the *general result;* for if evinced *pending the trial* they may endanger the verdict, and *if after the trial* they might occasion *a new trial,* and a great increase of expense, if not ultimate defeat. (*i*) Every witness should also be

(*i*) Thus in *Doe* dem. *Smith* v. *Smart*, on 25th of April, 1835, K. B., which was an action of ejectment tried at the last assizes at Salisbury, respecting the validity of a will, and which lasted four days, and the jury found a verdict for the defendant, contrary to the opinion of the judge, Mr. Erle moved for and obtained a new trial partly on the ground that one of the witnesses for the defendant had misconducted himself in the manner disclosed in the following affidavit of Mr. Houseman, the plaintiff's attorney, which stated that Dr. Grove was called as a witness by the defendant, to prove the soundness of mind of the testatrix, and that the foreman of the jury was the brother of Dr. Grove, at whose house he resided during the progress of the trial; and also that some of the witnesses had given him, the deponent, statements, which he reduced to writing, and sent to them for correction; *that they* corrected *their evidence*, and *returned it to* him, and *that they afterwards were called* on *the other side*, and gave *evidence differing from that* which *they had so corrected.* He then read affidavits, stating that the Rev. Mr. Duke, who was also a magistrate, and called by and gave evidence for the defendant, was actively engaged in collecting evidence for the *defendant* previously to the trial, and that *during* the trial he dined with some of the *special jurymen*, and that after the verdict Mr. Duke went on horseback in procession, decorated with ribands, saying,

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placed in an accessible part of the Court, and be strictly enjoined not to be absent at any instant before the verdict has been delivered, and closely to attend to the evidence given, and that if he hear any testimony that he can negative or qualify, he instantly inform the attorney who subpœnaed him to that effect.

"We have *gained the victory*, we have gained the day," and that he had *since written* a letter, stating that he *had discovered six new* witnesses to prove the competency of the testatrix.

Lord DENMAN.—Had Mr. Duke any interest?

Mr. ERLE.—None, but this kind of feeling.

Lord DENMAN.—It is very *improper conduct*, whether he was interested or not, if it be true.

CHAPTER XXVIII.

OF BRIEFS IN GENERAL (*a*)—MODE OF PREPARING THE SAME—DELIVERY OF BRIEFS—CONSULTATION WITH COUNSEL—AND EXCLUSION OF WITNESSES.

1. THE *brief*, (so termed from its being an *abbreviated* statement of the pleadings or affidavits at law, or of the bill, answer, and other proceedings in equity, with a concise narrative of the facts, and object of the suit, and statement of the proposed evidence,) frequently requires very considerable skill in framing the same. The party preparing it should be perfectly master of the client's case, and, as far as practicable, even of that of his

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1. General observations.

(*a*) I have prepared for publication a collection of Briefs, with appropriate observations in most of the usual actions, as settled by different eminent counsel, and probably shall publish the same with other Forms.

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adversary, and be able as well to *arrange* as *compress*, without any materal omission. As a preliminary general recommendation applicable to *all* briefs, they should, before they have been delivered to counsel, be *full and complete*, and not with any blanks as to sums, time, or otherwise, so that the counsel may on the *first* reading be in possession of all the facts, which would probably escape observation if inserted after the first reading; and where there are several counsel the briefs for each should correspond in the contents of each page and be paged alike.

2. Statement of the pleadings.

2. With respect to the very essential statement of the *pleadings*, as since the recent rules they have become more concise, with only one count or plea upon each cause of action or subject-matter of defence, the best course, as a general rule, will be to state *the whole of the nisi prius record verbatim, without any abbreviation;* by which it will appear, not only when the action was commenced, but also when the declaration was delivered, and not even a word in the pleadings or record will be left to conjecture, as has been too often the case when abbreviations have been attempted.

In the *margin*, even with the commencement of each technical division or parts of the pleadings, there should be an *analysis of the substance* of each count, plea, replication, rejoinder, or surrejoinder, &c. This analysis should be sketched by the junior barrister or by the pleader. Great confusion and trouble sometimes arises from mistakes in the misdivision of the counts or pleas, as by placing the words, "second," "third," or "fourth count," to a passage which only forms *part* of a count previously commenced, and one mistake in this respect will in general mislead throughout the whole of the pleadings. It is also advisable at the conclusion of the pleas, replications, &c. to state the names of the counsel who signed them, the same as we have seen is required by express rule in demurrer books. (*b*)

3. Observations on the effect of the pleadings as admitting or leaving it requisite to prove certain *material facts*.

3. When the pleadings are *special* or *complex* it is very expedient, after thus setting them out verbatim, to give a *distinct abstract* and statement of what *facts*, as far as respects the *pleadings*, are thereby admitted, or must still be proved or disproved by the plaintiff or defendant; (*c*) and if any point of

(*b*) *Ante*, 759.

(*c*) As, for instance, in an action on the case for an injury to a watercourse, it may be stated that the plea of not guilty has not put in issue the *inducement in the declaration* of the plaintiff's possession of a mill, and of his right to the benefit of a watercourse, which the defendant obstructed, but merely *the fact of the defendant's obstruction*, though in some degree the inducement *was part* of the description of the injury. See *Franklin* v. *Earl of Falmouth*, 4 Nev. & Man. 360; 1 Har. & Wol. 1; 6 Car. & P. 329; *ante*, 727.

law can arise at nisi prius respecting the *pleadings* it may be expedient to state them, and the reasons and authorities applicable; and where there is a doubt whether a particular count (as in an action for verbal slander) can be sustained in point of law, it is highly expedient to state such doubt, and to request the leading as well as junior counsel to take the verdict on the *other counts*, if the evidence will warrant, and not on the questionable count, lest the judgment should be arrested or a writ of error sustained, when by taking the verdict separately upon a valid count the difficulty would be avoided. It has been not unfrequent for pleaders, in cases of the least doubt, to insert one or more counts more general than the preceding, so as to take all chances of no objection being taken at nisi prius, but upon which it would be imprudent to take the verdict if it can be obtained on the others, and to which point at least the junior counsel should attend. However, that danger has been considerably diminished by the rule of Court prohibiting the use of more than one count on the same transaction. But the same observation may still apply in actions for words where several counts for different words spoken on other occasions are admissible.

4. Expediency in a declaration for *slander* of a statement on a *separate sheet* of the words declared upon, with and without innuendos, and why.

4. In actions for *Verbal Slander* it is also advisable, especially when the counts are numerous, to state on a *separate sheet* the slanderous words in each count; *first*, with the innuendos as stated in the declaration, and, secondly, without them; so that the counsel, as well for the plaintiff as for the defendant, may, whilst the witness for the former is under examination, be able readily to ascertain whether the substance of the words or part of the words stated in either count has or not been proved. In the hurry of a nisi prius trial it is often difficult, where the words are to be found stated in several parts of the brief, readily to ascertain whether or not the declaration has been proved; and yet it is often very important to be able to perceive *at an instant* whether the words have been proved, so as to avoid the danger of calling another witness, whose cross examination might contradict the former as to the words used, or otherwise prejudice the plaintiff's case. A fair copy of such separate sheet should be ready for the leading counsel to hand up to the judge if he think fit. It will be prudent also, when the action is on a guarantee or written document, to set forth a copy thereof immediately after the pleadings.

5. Expediency of an early consideration of suf-

5. It should be one of the first objects of the junior counsel (and indeed of each at the consultation) to consider whether,

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ficiency of the pleadings, with view to immediate amendment.

with reference to the facts of the case and the evidence, the *pleadings are sufficient*, or require amendment; and to consider the expediency of any *immediate* amendment, which although recent enactments have authorized several amendments *during the trial*, yet as they are attended with trouble and expense, and uncertainty whether the judge will permit an amendment at that late stage, it is always advisable to anticipate.(*d*)

6. A copy of the pleadings, and an analysis, and of the particulars of demand and set-off for use of the judge.

6. It is also expected of the attorney for the plaintiff to make a very fair compact copy of the pleadings, now in effect of the nisi prius record, *for the judge*, with the same marginal analysis of each part as before suggested, and also a copy of the particulars of the plaintiff's demand and of the defendant's set-off, if any, and which we have seen must be annexed to the record.(*e*) This copy of the pleadings should not be accompanied with any observations as to facts; though, perhaps, the parts most material to the case might without impropriety be underlined.

7. Statement of the particulars of demand or set-off in the briefs, and observations upon the same.

7. Whenever particulars of the *plaintiff's demand*, or of the *defendant's set-off*, have been delivered, and especially when they have been annexed to the nisi prius record, in pursuance of Reg. Gen. Trinity T. 1 W. 4,(*f*) exact copies of each should be inserted *in the brief*, immediately after the pleadings and the above suggested observations on the same. If it be supposed that such particulars limit, or in any respect affect the claim of either party, it will be proper, immediately after copying such particulars, to introduce a few appropriate observations, with references to authorities in support of them.(*g*)

8. Great utility of a preliminary analysis of the facts of the plaintiff's case, and of the expected defence, and of the proposed answer to the same. (*h*)

8. After the draft of the statement of the facts, with observations and proofs, has been settled, then the principal attorney should most carefully and clearly *analyse and state in three or more distinct paragraphs, concisely, first*, the *plaintiff's* case, and *very distinctly every item of the plaintiff's claim; secondly*, the *expected defence;* and *thirdly*, the *best* answer; perhaps

(*d*) The consideration of the expediency of amending, or of obtaining further evidence, forms a strong reason in favour of the *earliest delivery* of the brief, and a *consultation* very soon after.

(*e*) By Reg. Gen. Trin. T. 1 W. 4, copies of the particulars of plaintiff's demand and of defendant's set-off are to be annexed to the nisi prius record, *ante*, 613 to 618; but still the same, in a more compact and disannexed state, will be more accessible, as the parchment record is not usually handed up to the judge unless in case of doubt as to its contents.

(*f*) *Ante*, 613 to 618.

(*g*) See an instance, *Breckon* v. *Smith*, 1 Adol. & Ell. 488; *ante*, 615, note (*z*).

(*h*) See suggestions to the same effect in Lee's Prac. Dict. tit. Brief, 2d ed. page 298.

the form in the note might be adopted.(i) These three paragraphs, very legibly written, should form the commencement of the brief immediately after the statement of the pleadings, and should not exceed a few lines. Every well prepared brief, however voluminous the subsequent full statement may necessarily be, should contain such a *preliminary statement* or analysis of the *substance* of the plaintiff's case, and of the supposed attempted defence and its answer. This prepares and enables the counsel to *anticipate* what will probably be the most material facts of the case, and to *read* the subsequent detail with more rapidity and advantage, by paying more attention to what he has thus collected, will be the more important points, and consequently more deeply to impress them on his memory; whereas if the counsel be left to draw his own analysis *after reading the whole brief*, he will frequently have wasted time upon less important circumstances, from want of being *previously* apprised of the real points in the cause. It is well known that a most distinguished leader at the common law bar, now justly elevated to one of the highest judicial stations, would from a mere momentary perusal of such an abstract, when the press of multifarious business rendered it impracticable for him to read the entire brief, conduct a very heavy cause with comparative facility and success. At all events, a counsel of considerable experience, having an accurate analysis before him, can in general anticipate the ordinary collateral circumstances; and consequently, after having read such a summary, can rapidly read the subsequent detailed exemplification of the facts and evidence, when without it his mind could not arrive at any conclusion until he had got through the last page of his brief. An able preliminary analysis will in general render *one* reading of a brief sufficient, whilst otherwise repeated examinations might frequently be necessary.

(i) From want of some such analysis, the leading counsel might omit to open or state all the claims, and endanger the verdict pro tanto, as in *Benson* v. *Lee*, 2 Bos. & Pul. 330; *Paterson* v. *Zachariah*, 1 Stark. R. 72. The form of analysis might be thus:

Suggested form of analysis in Brief.

1. Plaintiff claims 100*l*. insured by defendant, by policy dated —— A. D. ——, on ship ——, on voyage from —— to ——, lost by stormy weather, on —— day of ——, A. D. ——.

Also claims 11*l*. 11*s*. for premium paid to defendant;

Also *interest* from time when payment was demanded on the —— day of ——, A. D. ——, and refused.

2. Expected defence. Ship not seaworthy.

3. Proposed Answer. Vessel stood A. in Lloyd's books, and was aged only —— years; immediately before voyage ship was thoroughly stripped and examined by four eminent ship surveyors in dry dock at ——, and underwent an unlimited repair there, at expense of £——, and was afterwards again examined and reported by four other surveyors and two merchants; and mate and crew and others, for three last voyages will swear to her seaworthiness. Not one doubtful witness, and I have personally examined each.

G. H, Plaintiff's Attorney.

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9. Full statement of the case.

9. The *Case*, or *full statement* of the *Facts*, with *Observations*, should properly follow the above suggested analysis, and precede the statement of the proposed proofs. It is in preparing this part of the brief principally that the skill of an attorney at common law, whether in cases at the civil or criminal bar, and of a solicitor in equity, is displayed. Innumerable causes have been lost entirely by the *imperfect brief* delivered to the counsel, not merely by the *omission* to state *material facts* that might readily have been ascertained, but by the confused and jumbled mode of statement. The facts and the evidence in support of the plaintiff's and defendant's case, and the probable opposition and expected evidence in support of each, must not only be stated, but they must be stated in clear and logical order.

The *detail of facts* should be in the *natural historical order*, stating circumstances *as they arose*, whether for or against the plaintiff. In this statement it is in general expedient to communicate the *whole of the facts*, though as yet no legal evidence may have been discovered relating to certain enumerated parts; because perhaps by putting counsel in possession of such facts, evidence of their existence may be elicited by the cross-examination of witnesses, or suggested by the defendant's own case. But then in stating such facts, the counsel should be cautioned whether or not any third person was present, or whether there is the remotest chance of proving them, and how.

10. Statement of written documents, letters, &c. maps, plans and models.

10. In preparing the brief, it is in general advisable to *incorporate* all important or explanatory documents and letters, unless they be very voluminous. This is preferable to a reference to detached papers, because counsel can more readily make observations upon them in the margin of his brief, and in the crowd and hurry of nisi prius, detached papers cannot be so readily referred to. It will be advisable also in the margin to state the date of, and designate each by numbers or by letters, as A. B. C. &c. corresponding with the same numbers or letters indorsed on the backs of each, and in the possession of the attorney, regularly arranged in a bundle; so that the counsel may call for the originals, and they may be produced with the utmost expedition.

11. Utility of maps and plans.

In many cases, especially where the jury have had a view, it may be very material for both parties to have *maps*, *plans*, or even *models* of lands, watercourses, and buildings, carefully prepared, and their correctness proved by the artist, and many

important cases have, for want of the information thereby given, failed on the trial. (*k*) When opportunity occurs, it is also advisable that at least the junior counsel should examine the premises with such map, plan, or model, before the trial. Many verdicts would be saved by adopting this precautionary measure. These documents should always be disannexed from the briefs, and very fair small copies should be ready in Court to show to the judge and jury. The latter copies should not, as it is termed, "*give evidence*," i. e. no statement should be written thereon that would favour either party.

12. An analysis of the dates of all material facts to follow.

12. A compact analytical table of the *dates* of every material fact, arranged in natural order, may then in general follow with utility.

13. Observations on facts and points of law and evidence relating to the plaintiff's case, and on the probable defence, and proofs in support thereof, and answer to the same.

13. After the statement of facts, it is generally useful to introduce some *observations* and reasonings on the *plaintiff's* case and upon the proposed evidence, and also on the expected case, and proofs on the part of the defendant. If any difficult point of law, either on the facts or on the admissibility of evidence, be anticipated, it may be useful to observe upon it, especially on the circuits, where books may not be accessible, and to make verbatim extracts from cases bearing on the subject, stating the authorities by names, as well as by reference to the pages of the works where they are reported.

14. Previous opinions of counsel or pleader to be stated at length, and not abbreviated or incorporated.

14. It has been too commonly the practice to state the substance of the opinion of the counsel or pleader, as if the same were the observations of the attorney preparing the brief, thereby in a great measure neutralizing its utility. It will be found preferable to give an exact copy of the opinion, if not also of the case upon which it was founded, with the name of the counsel or pleader giving it, for although the observations of any sensible and experienced person, might *substantially* be of equal value, yet it may reasonably be considered by the counsel in the cause, that an opinion deliberately given by a counsel or pleader, when formally consulted, is a stronger pledge for correctness than mere observations inserted when preparing the briefs, and certainly would probably induce such counsel more

(*k*) See an instance, Lee's Prac. Dict. tit. Brief, 2d ed. 298; and yet the expense attending experiments and plans, it seems, are not allowed in taxation, *Severn* v. *Olive*, 3 Brod. & Bing. 72; 6 Moore, 235, S. C. It is therefore advisable for the attornies on each side to agree that one artist shall prepare the whole, and that the clients shall divide the expense, or that the same shall be costs in the cause.

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strongly to endeavour to support the opinion when favourable to his client's case, unless upon a view of the whole case it might on the trial be injudicious to adhere to such previous view.

15. Analysis of proposed proofs.

15. In an important cause, or where the documents or witnesses are numerous, it has ever been found useful, immediately before the detailed statement of the proofs, to insert a brief sheet, containing an "*Analysis of Proposed Proofs,*" being merely an abstract of the following proofs, and referring to the pages where each will be found, and to be headed thus:

ANALYSIS OF PROPOSED PROOFS.

1. Fiat and petition against Y. Z. the bankrupt, page .
2. Declaration of bankruptcy and proceedings under same, *id.*
3. The trading, *id.*
4. Petitioning creditor's debt, *id.*
5. Acts of bankruptcy, page .
6. Assignment to plaintiffs as assignees, page .
7. Bankrupt's certificate, page .
8. Property in the bankrupt, page to .
9. Witnesses.

   Tomkins, John. Late foreman to bankrupt, page .
   Atkinson, James. Porter to the bankrupt, page .
   Caldwell, Thomas. A carrier who removed the goods to defendant's premises, page .

Proceeding with the statement of all the witnesses' names, however numerous, and reference to the subsequent pages where the evidence is stated.

16. Mode of stating the *proofs.*

16. With respect to the *mode* of setting out the *proofs* or *evidence,* they should be stated in the *middle* of large *brief* paper, with a four inch margin on the *left* hand side for counsel to make observations or hints, and also a *right* hand four inch margin for the name of the witness, with a concise statement of his age, quality, education, understanding, general behaviour, and character, temperament, probable bias or inclination, as favourable or adverse; and all other material facts affecting his character as a witness in the cause. Sometimes this form in preparing the proofs is not adhered to, especially in country briefs, and many inconveniences ensue; viz. by naming the witness only in a narrow left hand margin, and then writing his expected evidence across the page, and leaving no right hand margin.

17. Formal proofs.

17. In point of *arrangement*, the best course is first to state the *formal proofs* which may be indispensable in certain causes, independently of the *merits*. These proofs are in general to be first stated and adduced, because it would be useless to go into a full investigation of the merits, if there be *any formal objection* to the action, as for want of a previous notice of action, or demand of warrant, &c.; and because it is better that the junior counsel should adduce such formal proofs whilst the leader has a small respite from his fatigue, and that the more important witnesses should be left for his examination; as was heretofore the case in actions against a sheriff for a false return, when the judgment in favour of the plaintiff, the writ of execution and return, and the warrant to the officer, were essential when the general issue was allowed; and in an action by the assignees of a bankrupt, the commission, petition and assignment to the plaintiffs, the trading, petitioning creditor's debt, and act of bankruptcy, when disputed; but the recent rules we have seen have dispensed with such proofs, unless the plea has expressly put them in issue.(*l*) But in actions against justices of the peace, or other public officers who are still allowed to plead the general issue, and put the plaintiff to prove every matter, the due service of a notice of action, the issuing of the writ, and his having acted illegally in the particular proceeding complained of, must be first proved.

18. Evidence of the *Merits*.

18. After these or other formal preliminary proofs, then the full proofs of the *merits*, according to the nature of the case, should be stated in natural logical order. In preparing the latter, attention should be paid to arrangement, and much judgment is frequently required.

19. All the evidence to be given by the same witness to be stated *consecutively*.

19. It has been sometimes improperly the practice, in framing the brief, to *detach* the *parts* of the evidence to be given by *the same* witness on several different points in *different parts* of the brief; and, independently of the additional trouble to counsel, it has been frequently found that were it not for the attention of the junior, who has usually more time to become master of every part of the brief, an important part of a witness's testimony has nearly escaped attention, and been lost to the cause. In practice, when a witness is placed in the box the whole of his evidence must be elicited before the cross examination commences, unless by special permission of the Court; and which

(*l*) *Ante*, 809.

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should be applied for at the time he is first examined, upon the intimation of the counsel that it may be the most convenient arrangement and order of the cause, if the judge will allow the same witness again to be called to prove another point. Consequently the plaintiff's as well as the defendant's attorney, should in his brief state *consecutively* the whole of the testimony that a witness can give, with a small note in the left margin, opposite that part of his evidence, stating very concisely the different points and facts to which he can speak. And supposing that it may be necessary to call the witness again in another stage of a long cause, his name and proofs may be *repeated* in the other proper part of the brief, where the other proofs respecting that part of the subject will be found collected.

20. Age and character of each witness to be stated.(m)

20. The age, *character* and *temperament* of each witness, as well moral as physical, should be stated, as whether he be habitually too confident or zealous, or hasty, in which case he may require to be moderated and restrained; or whether he is timid, diffident or hesitating, when he may require to be assured and encouraged. Every peculiarity in a witness, as regards the probable mode of giving his evidence, should be well ascertained, and concisely stated in the *right* hand margin of the brief, immediately under his name, or immediately under the detail of his evidence. So if there be any imputation against his character, or any pecuniary or other interest in the cause that may affect his legal competency, or even his credibility, the particulars should be stated. If, from the witness having declined any interview, or for any other reason, the evidence of such witness will be uncertain, then under his name may be written "*doubtful*" or "*dangerous*;" and if his feeling be known, the word "*favourable*," or "*adverse*," may be subscribed. If it be known that the witness will be verbose or rambling or too rapid, or apt to crowd too much into a sentence, the counsel should be cautioned to confine the witness to mere short answers to detached questions put separately; for otherwise he might distress the judge from his inability to write fast enough to take down all his answers; or when it will certainly be so, the brief may suggest that the witness is so discreet, that he may be allowed to state the narrative slowly, and will watch the judge's pen. By adopting this prudential course, the frequent nonsuits arising from calling an adverse, or otherwise injurious or doubtful witness, may be avoided. When there are two or

(m) See further, Lee's Pract. Dict. 2nd ed. 299.

more witnesses to the same transaction, the *best* witness should be put first; because the judicious advocate may wish to make a strong impression upon the jury in the first instance, or may resolve to call no more on the point when satisfactorily proved by one, lest a subsequent witness may, as frequently occurs, destroy or weaken the case. (*n*) Sometimes, however, in heavy causes, as in trials of rights of way, customary rights, or pedigrees, it may be considered more judicious to call one or two of the best witnesses in the first instance, so as to establish a favourable feeling with the jury; and then to corroborate by numerous other witnesses of less weight, and to close the case by calling one or two of the *very best and most impressive witnesses,* so as to leave a *very strong and continued impression* on the minds of the jury. Perhaps there is no part of professional conduct in which superior judgment is so much evinced, as in ascertaining when it may be anticipated that the jury have been sufficiently impressed with a favourable opinion of a point that cannot probably be removed, and then to stop. (*o*)

21. Arrangement or order of the witnesses.

21. If there be a doubt whether in point of *law* any particular witness or his evidence be admissible, then in the margin, under the name, may be written, "*admissible,*" or "*quære competency;*" concisely stating the decision and authority on the point and the words of the judge if short in such margin, and if long in the body of the brief.

22. The proofs should state in detail the whole of the facts in the words of the witness, and not merely in reference to a prior part of the brief.

22. In preparing the *proofs,* it is ever to be remembered that it is extremely inconvenient in practice to refer merely to any previous statement of facts or evidence in the *body* of the brief; but that the whole of the expected testimony should be stated in the proofs in detail, with dates, and in the *very words* that, from the prior examination, it is expected the witness will *certainly* answer the questions, and also what it is only *apprehended* he may *probably* state; and as it will be recollected that counsel cannot, except in a few cases, put *leading* questions to a witness called by himself, it may be useful to suggest what unobjectionable questions may possibly lead to the eliciting a full disclosure; as by shortly touching upon some collateral incident, which may be adverted to in the margin or body of the brief, and which may rouse the memory to recollection. After

(*n*) As in *Wright* v. *Beckett*, 1 Mood. & Rob. 414, after four favourable witnesses had been called by the plaintiff's counsel a fifth was unfortunately called, who contradicted the four, and greatly endangered the verdict.

(*o*) As to the importance of first impressions, Lee's Prac. Dict. Brief, 2d ed. 299; see an instance of a fifth witness turning round on the plaintiff, *Wright* v. *Beckett*, 1 Moody & Rob. 414.

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exhausting all the evidence expected to be given favourable to the plaintiff, it may in some cases be advisable to state what possibly the witness may be compelled by the opponent to state on *cross-examination*, and to give instructions for *re-examination*, to explain the primâ facie unfavourable answers that may probably have been given on such cross-examination.

23. Mode of stating proofs in a brief upon a tradesman's bill.

23. In the frequent actions for the amount of tradesmen's bills, as for goods delivered, or work done at different times, and which can only be proved by numerous shopmen, servants, carriers, or other witnesses, it is in general advisable to make a copy of the whole account, with the appropriate dates in due order of time, and sufficient spaces between each item; and then in the left margin, opposite each item, to write the name of the witness or witnesses who can prove of his own knowledge the order for and delivery thereof, and the value. And two or more fair copies of this should be deliberately examined by the several witnesses who can thus prove each item; and he should write his name or initial on such left margin immediately in a line with the respective items; and one of such originals, thus signed by the several witnesses, should be handed to the judge, and the other retained and shown to each of the witnesses as he is called into the witness box; and who may then be merely asked whether the signature is his, and whether he can swear to the delivery to the defendant of the items to which his signature is attached; and the counsel should examine the witnesses from a duplicate, and each witness must, by previous examination, be certainly able to swear that all the items to which his initials are placed he knows of his own knowledge were delivered, or that the work was performed; and his memory may be refreshed by producing the day-book in which he entered each item on the very day it was delivered by him.

24. Statement of the *expected defence*, and of the supposed *evidence* in support thereof.

24. After concluding the evidence for the plaintiff, it will be proper in many cases to state more in detail than in the previous analysis the expected defence, and the evidence that will probably be adduced in support of it, with full observations upon its fallacy or weight, and the names and characters of the witnesses for the opponent, with suggestions as to questions to be put on the voir dire, as whether the witness is bail for the defendant, &c., and all circumstances upon which a cross-examination may be useful. But in preparing the latter the *facts* only are to be stated, leaving it in general to the counsel's discretion what *particular questions* should be put, and which

need not be stated in the brief, though sometimes useful as another mode of stating the facts.

CH. XXVIII. Brief for Defendant.

25. It may appear too trifling to add any suggestion respecting the *indorsement* on the brief; but as it has occurred that the junior counsel has attended in the *wrong Court*, it is at least advisable, as well on the outside as at the head of the first page, to write the proper Court in very large legible characters. The name of the plaintiff and the defendant, the number of the cause in the general list, as well as in any particular list for the day, the names of the several counsel, the exact hour appointed for any consultation, and the name and place of abode, or temporary residence of the attorney when at a Circuit Town, should be clearly stated.

25. Indorsement on the brief and fees.

With respect to the *fees*, it is important that, at all events in this stage of an action, they should be liberal, if not handsome: not because barristers would, under any circumstances, relax their exertions on behalf of the client, however inadequate the remuneration; but because the amount of the fee is considered the criterion of the estimation in which the client or his attorney holds the talent and value of the assistance of the barrister; and it is an unconquerable incident of human nature to be gratified by a high estimate, and annoyed, if not disgusted, by one that is degrading. It is better to give no fee than one that is humiliating; and at all events the practice of giving briefs to numerous counsel in a cause, with very small fees to each, merely for the purpose of charging for several briefs and attendances in the bill of costs, is contemptible. Considering the hours that must be consumed out of Court in studying the briefs, and afterwards in attending the Court and on the trial, nisi prius fees are in general very inadequate.

The fees.

Of the Brief for the Defendant.

The brief for the *Defendant*, although in many respects resembling that for the plaintiff, yet it must differ in some particulars. As regards the *pleadings* and any *suggestion* on the issue or nisi prius record, they should be copied verbatim (and not abbreviated); and copies of the particulars of the plaintiff's demand and of the defendant's set-off, if any, should follow the statement of such pleadings. In the next place should be given a concise but perspicuous *analysis* of the expected claims on the part of the plaintiff, and of the proposed grounds of defence, and how it is expected the plaintiff will attempt to

Of the Brief for the Defendant.

answer the same, (*o*) and then a short statement of the expected result, as well upon the merits as upon the law; this should only occupy a few lines, it being designed merely to put the defendant's counsel at one view in possession of the substance of the material points and questions, and to enable him to read with more facility and advantage the subsequent full statement of the whole facts of the case.

The *full narrative* of all the facts stated in the natural order of time, and with dates as they succeeded each other, should then be given, with occasional intimations how the facts are to be proved, or how it is expected the defendant may be able to prove them, or contradict the plaintiff's evidence.

Then should follow (when it is expected that any point of law may arise respecting the facts, or the pleadings, or the evidence,) comments on such points of law, and verbatim extracts from statutes and decisions.

In the next place, hints may be suggested as to what the plaintiff should be required to prove, and it may be stated what witnesses and evidence it is expected he will call, and the description, age, education, character, and party feeling of each, with full instructions for questions to be put to the plaintiff's witnesses on the *voire dire* as to their competency, and for cross-examination. As regards, however, the *cross-examination* of witnesses, although the brief for a defendant should contain a very full statement of all the facts on each side, with suggestions as to facts favourable to the defendant, that all or particular witnesses are supposed to know, or probably will disclose on a strict cross-examination, yet the *form of* the actual cross-examination must be left to the discretion of counsel, especially as it is well known that the exercise of that part of professional duty is perhaps the most delicate and difficult of the whole. On the one hand, if, according to the expectation of the client or a jury, certain questions are not put, blame may attach to the counsel, and perhaps the attorney; whilst on the other hand, experience teaches that more frequently cross-examinations strengthen the opponent's case, and that witnesses in general, upon a cross-examination, usually more strongly establish the case of a plaintiff in a civil action, or that of the prosecutor of an indictment, so that the case of the defendant is rendered hopeless before his counsel has even stated his case to the jury. (*p*) Indeed the cross-examination of the plaintiff's

(*o*) See the analysis in a plaintiff's brief, *ante*, 850, 851.

(*p*) In general defendants, especially in an inferior station of life, are not satisfied unless the plaintiff's witnesses are cross-examined; a defendant's attorney should therefore explain to him, before the trial, why it is probable that his counsel may not cross-examine. The late Mr. Poolly, of the Home Circuit, a barrister distin-

witnesses should in general be left to the senior counsel for the defendant, unless the next in rank is of considerable experience. In general when a judicious counsel for the defendant, from the conduct and manner of a witness for the plaintiff, expects that he will adhere to his evidence in chief, and that he cannot by cross-examination shake his credit, he will put no question *at all;* and afterwards, in his speech for the defendant, and in the evidence subsequently given, will endeavour to establish either that the witnesses for the plaintiff have been under a singular delusion, or that the point established by them is quite beside the true question, and which his speech and sometimes the evidence he will call will demonstrate. (q)

Proofs for the defendant, and statement how they were obtained.

The *proofs* in support of the *defence* must next be stated in the same mode as before suggested in a plaintiff's brief. It will be advisable to preface them with a statement that the defendant's attorney has himself, or his experienced clerk privately and apart from the client, examined each of the witnesses, and that he can confidently rely on the detailed evidence of each, he being in possession and ready to prove that at the time of the examination of each witness, he took down their statement of the facts as they would prove them, and that they afterwards in their own hand altered such statement, as will appear by the memoranda in his possession.

When the counsel to be requested *at all events* to give evidence for the defendant.

In general when an experienced leader for the defendant has been retained, it is most judicious to leave it entirely in his

guished for his legal knowledge and excellent prudence, especially in his defence of prisoners, related an anecdote of himself; viz. that having defended a notorious highwayman, whose case really was desperate, but who was acquitted in consequence of the prosecutor having given very confused evidence, which the defendant's counsel thought it prudent not to cross-examine, lest he might thereby clear up the points left in doubt; such defendant called on him one evening in the Temple, and in a ruffianlike manner demanded back and obtained the fee, saying it is true I was acquitted, but no thanks to you, for you never opened your mouth for me, and I cleared myself by my own innocence.

(q) Thus in an action by the Vauxhall Bridge Company, against the purchaser of an old and very bulky vessel, to be broken up, for improperly conducting her through the bridge, and thereby damaging the crown of an arch, &c. numerous witnesses for the defendant swore to the utmost exertions to conduct the vessels through the arch without injuring the same, and after cross-examination of two of such witnesses it was obvious that it rendered them more positive that the greatest care had been observed, and therefore further cross-examination was given up; but one of the witnesses having admitted that the day was *very windy*, and that on a calm day one man alone, in a boat a-head, might have readily towed the vessel through, the plaintiffs' counsel forcibly replied upon that admission, as entitling the plaintiffs to a verdict; because the defendants had no right to tow up so large a vessel, not usually navigating that part of the river, and merely for breaking up, on such a *windy day*, but should have waited for a proper time, when no damage would have occurred; and the judge and jury adopting that view, the plaintiffs obtained a verdict for the full damages. This case also establishes that an attorney for a defendant should well consider the validity of the *point* or *ground* of his defence, as well as the quantity of evidence in support of it.

CH. XXVIII. BRIEF FOR DEFENDANT.

discretion whether or not to give evidence for the defendant, the former entitling the plaintiff's counsel to the general reply; but still the safest course is for the attorney fully to consult the wish of his client upon the course to be adopted, and either at the head of, or immediately following the *proofs*, to state the result; as that the defendant, as well as his attorney, having entire confidence in the proposed evidence, requests the counsel to enter into the defence and examine the evidence, unless it *be manifest* that he will be *more secure of the verdict* by a contrary course.

SECT. IV.—WHEN A DIFFERENT STRUCTURE OF THE BRIEFS MAY BE ADVISABLE.

SECT. IV. WHEN A DIFFERENT STRUCTURE OF THE BRIEF ON EITHER SIDE MAY BE ADVISABLE.

The above outlines of the modes of framing briefs suppose that the *plaintiff* is *to begin* and his counsel make the opening speech and then to call evidence, and that the *defendant's counsel* will *afterwards* state his defence and call witnesses in support of the same. But if the affirmative issues are on the *defendant*, and *he is* to begin, according to the practice stated in the next chapter, so that *he* will *first* call evidence, the briefs should be framed rather differently, though the variation will be inconsiderable, and consist rather of *transpositions* of parts than being different in matter. In the latter case also the briefs should begin with the *pleadings, particulars, concise analysis, and full statement of the* facts; the *differences* will be that in the *defendant's* brief (who is *then to begin*) his proposed proofs should *immediately* follow the full statement, and after they have been exhausted, then should follow *suggestions* upon the expected case of the plaintiff, and the evidence and witnesses he will probably adduce in support of the same, and instructions for cross-examining such witnesses. Suggestions may then follow as to any evidence in reply for the defendant, and conclude with a statement of such evidence and observations for the defendant's counsel in reply and which will close such order of brief for the defendant when *he* is to *begin*.

The *plaintiff's* brief, when his counsel is *not* to begin in consequence of the affirmative being on the defendant, and the action not being for a *personal injury*, as libel, slander, malicious prosecution, &c. (r) is to begin with the pleadings and the particulars, and an observation that the issues, being all on the *defendant*, his counsel are to begin. Then will follow the before suggested concise analysis, and then

(r) See *post*, 872 to 877, next chapter, as to which party is to begin, and see the exception, *Carter* v. *Jones*, 6 Car. & P. 64; 1 Mood. & Rob. 281, S. C.

the full statement of the whole case on both sides, the same precisely as in a brief when the plaintiff is to begin. After which follow observations on the expected evidence of the defendant, and an account of his witnesses, and instructions for their cross-examination. In the next place will follow the proofs for the plaintiff, prefaced with observations that the attorney himself has examined each witness apart from the client, and how far the counsel may be assured that their testimony in Court will correspond with the statement of the proofs in the brief, and that therefore counsel are requested to call such witnesses, unless he be quite confident that a verdict for the plaintiff will be better secured by merely observing on the defects in the defendant's case or his evidence, thereby avoiding any concluding speech of the defendant's counsel.

WHEN A WATCHING BRIEF MAY BE DELIVERED.

Of a Brief merely to watch the Plaintiff's Proceedings.

It is clearly settled in practice, that when there has been an irregularity in the issue or notice of trial, of which the defendant intends to take advantage, a brief may be delivered on his behalf to counsel, with instructions *to watch* the plaintiff's proceedings, and the counsel may take notes without prejudicing any subsequent motion to set aside the proceedings; (*s*) but such counsel must not otherwise interfere, still less cross-examine witnesses. (*t*)

SECT. V.—OF THE DELIVERY OF THE BRIEFS TO COUNSEL, AND PROCEEDINGS THEREON.

Sect. V. Delivery of the Briefs to Counsel, and Proceedings thereon.

The attornies for the plaintiff and defendant will be justified in incurring the expense of delivering their respective briefs to counsel as soon as practicable after notice of trial. As regards a *plaintiff's attorney*, it would seem that, especially in a heavy or difficult cause, he would be justified in proceeding from time to time to prepare his brief, even before notice of trial, and might enforce remuneration for so doing from his own client. And although a *defendant's attorney* may have no right to prepare his brief *until after notice of trial*, so as to charge the opponent with the expense; yet if the cause were of much importance it might be otherwise, at least so as to charge his own client. In London, where there is a list of causes for the day, every body is expected to be ready, and the defendant's attorney must take care to deliver his brief to his counsel previous

(*s*) *Ante*, 781, 782; *Lawson* v. *Robinson*, 2 Dowl. Rep. 70, 71.

(*t*) *Doe* v. *Jepson*, 3 Bar. & Adol. 402; *ante*, 782, n. (*y*); *Grosjean* v. *Manning*, 2 Tyr. 726; 2 Cromp. & Jer. 635.

CH. XXVIII. Delivery of Brief to Counsel, &c.

to the sitting of the Court on that day; but that rule does not apply to the assizes, where there is a list of eighty or one hundred causes, and it would be very hard if all parties were obliged to be prepared on the first day; and in that case it suffices for a defendant's attorney to deliver his brief, in a very short cause, a short time before the cause in its natural order would come on for trial, and a plaintiff should not take it out of its turn. (*u*) The early delivery of the briefs may be of the greatest importance, for even the leading counsel in the fullest business may sometimes have an opportunity of an early perusal; but at all events, as regards the junior counsel, who may have most leisure, an early delivery may be of the greatest utility, for probably his progress in the profession will much depend on his earliest diligence and speedy communication to the client of any difficulty in the pleadings or evidence, so as to afford the first opportunity of amending either. (*x*) Many verdicts have been saved by such energetic attention.

Sect. VI.—Of the Consultation immediately before Trial.

Sect. VI. Consultation immediately before the Trial.

In causes of the slightest doubt or difficulty, it is highly expedient that a *Consultation* should be held between the counsel who are to conduct the trial, and the attorney or clerk, who himself examined the witnesses and prepared the brief. This should be had as soon as each counsel has had sufficient opportunity to read his brief, and *at all events* a sufficient time before the trial, so as to obtain *an amendment of the pleadings or further evidence*. In general, consultations are held too late to be of that full *utility* they might have been. They however at all events are attended with the advantage that the junior counsel may suggest to his leader any supposed difficulty in the pleadings or evidence, and it is particularly useful in enabling all the counsel and the attorney to learn from the leader his projected mode of conducting the case, and so that all may, during the trial, act in concert and not mar his superior plan of operation. In very heavy and important causes, it may be advisable to have two consultations, the first immediately after the counsel have read their briefs, and the other in the evening, or at least a short time before the trial.

(*u*) *Aust* v. *Fenwick*, 2 Dowl. 246.

(*x*) It is a well known fact, as regarded Lord Kenyon, and afterwards the late Mr. Marryatt, that their rapid increase of business was much attributable to their very early attention to the examination of their briefs, so that each *frequently* sent off useful communication before the clerk who left the brief had returned to the office of his principal.

In consultations on a *defendant's case*, it will be of the very utmost importance, after ascertaining from his attorney how far the statement of the defence and the evidence in support of it may be depended upon, to arrange the exact course of defence, and to determine on the cross-examination of the plaintiff's witnesses, and above all whether or not evidence shall be given on the part of the defendant, or withheld, so as to avoid a reply on the part of the plaintiff. The wish of the client himself, as well as of his attorney, should certainly be consulted before it be resolved not to enter fully into the suggested defence. CH. XXVIII. CONSULTATION BEFORE TRIAL.

It is a well established rule, that *witnesses* are not to be present at consultations (excepting professional and scientific men in explanation of patents, machinery, &c.); because if they were, they might ascertain the views of the counsel and shape their evidence upon *facts* accordingly, at least with a shade of colour or leaning, which should ever be avoided. (*y*) Witnesses not to be present at consultations, and why.

For the same reason counsel individually should be exceedingly *cautious at all times, whether in or out of Court, to avoid any suggestion to a witness respecting his evidence;* but at most advise the *attorney* that certain facts should be further examined into, without communicating to any one the desired bearing or object. To this rule some exceptions may be permitted, according to the discretion of the counsel, and his belief in the honour and integrity of his client; such as a counsel going over a very intricate account with an accountant, who is afterwards to prove its correctness, and without which co-operation the counsel might be unable to explain such account either to the judge or jury.

SECT. VII.—OF NEW DISCOVERIES JUST BEFORE TRIAL.]

It frequently occurs that in consequence of the witnesses on each side associating in or near the Courts for perhaps successive days, just before the trial of the cause they converse with each other, and some material evidence is thus communicated favourable or adverse to one of the parties, but which may nevertheless be subject to just explanation and answer, if ascertained in time. For such events a zealous and intelligent attorney should always be on the look out, and should immediately endeavour to improve his case, and deliver to his counsel a proper further brief. SECT. VII. NEW DISCOVERIES JUST BEFORE THE TRIAL, TO BE COMMUNICATED TO THE COUNSEL.

(*y*) This we have seen is an invariable rule in the Scotch law, *ante*, 824, note (*l*).

CHAPTER XXIX.

OF THE TRIAL AND ITS INCIDENTS. (a)

(a) Although some of the subjects of this chapter may on first view appear to relate principally to the conduct of *counsel* during a trial, yet it will be found that they are equally essential to be known and attentively observed by the attornies on each side; because if any point be omitted by the counsel, the attorney will do right to give him *immediate hints and assistance*.

CHAP. XXIX. TRIAL AND ITS INCIDENTS.

1st. General Observations.

1st. THERE is not perhaps any scene in life which, though of daily occurrence, excites so many various interests and talents as a contested trial at law. (*b*) The *parties*, their *attornies*, and *witnesses*, the *counsel*, the *jurors*, and even the learned *Judge*, (though in very different degrees, and influenced by very different feelings and motives,) are all *deeply interested*, and *excited* either by the *matter* in question or the *manner in which it is to be conducted*. The *Parties*, at all events, are deeply interested either in the value of the *subject* in dispute, or the *costs*, or exposure of *character*, incident to public investigation. (*c*) The respective *Attornies* participate in the same feeling, and are influenced by the apprehension that the result of the cause may in some measure affect their professional characters, either on account of the inexpediency of the proceeding, or of the defence, or the want of skill in conducting or defending it. The *Witnesses*, whether or not (as too often the case) influenced by relationship, friendship, or secret interest, or by political or party feeling, are, at all events, anxious to acquit themselves

(*b*) Hence the most eminent actor of modern times, who was extremely partial to attendance in Courts of justice, used to observe, that "a superior Court during "a contested trial is a *perfect theatre*, in "which the most talented actors perform "their respective parts with perfect skill "and home to nature;" and the late Lord Erskine, in an action for seducing and afterwards deserting the plaintiff's daughter, who sank lifeless in Court, observed, "*Morality* "comes *in cold didactic* from the *pulpit*, "but when the lamentable consequences "of deviation from its injunctions are thus "practically illustrated and commented "upon from the seat of justice, it strikes "home to the *heart*." And Lord Bacon observes, "that it is impossible there can "be anarchy or confusion in any country, "whilst the administration of justice conti- "nues to proceed with integrity and impar- "tiality on the parts of jurors and judges."

(*c*) In Sir Horace Walpole's memoirs there is an interesting anecdote of a clergyman, party to a tithe cause, who had really gained his cause, but having out of joke been told the contrary, from excitement, died suddenly; and the author was only a few years ago concerned in a cause at Maldstone, which in some measure involved the honour of the son of a witness, and who, from the apprehension of the exposure, a few hours before the trial came on, put an end to his own existence.

CHAP. XXIX. TRIAL AND ITS INCIDENTS.

with credit in Court; and some instances have occurred when the self conviction of perjury has literally stricken the *witness* to the ground.(*d*) The *Junior Counsel* is excited in no small degree, lest his laudable desire to advance in his profession may be marred by some inadvertency in framing the pleadings, or in his examination of the witnesses, or that he may, in some stage of the cause, incur the disapprobation or displeasure of his leader, or even of the judge, which might prejudice him in subsequent causes. The *Leading Counsel*, however justly confident in his knowledge of law and great experience in nisi prius tact, may yet well be nervous and apprehensive that he may not present the particular case to the judge and jury in the most favourable manner for his client, or that he may omit some material point, or may miscalculate by calling *too many* or *too few* witnesses, or fail in the want of adequate energy in his address to the jury, or in some other mismanagement of the cause. Each of the *Jurors* also, if alive to his duty, should feel no inconsiderable anxiety to forget or not be influenced by any previous or sudden prejudice, and to suspend his judgment until the case has been closed and he has heard the observations of the judge. The learned *Judge*, however experienced, cannot be entirely free from apprehension that he may fail in the due fulfilment of his very arduous duties, or may misapprehend some rule of law or its application to the particular case, or may draw an incorrect conclusion as regards the evidence, or that his misstatement to the jury may mislead them and become the subject of an expensive application to the Court for a new trial, or occasion a Bill of Exceptions or a Demurrer to evidence. Again, in some causes affording an opportunity for, and perhaps even *demanding* strong observations on the misconduct of a party, or his attorney, or a witness, so as to repress and prevent a repetition of such conduct by the party or others, the judge may, on the one hand, consider himself bound to animadvert upon such misconduct, lest it should be supposed that he, standing in his exalted situation, is indifferent to the violations of morality and religion; (*e*) and yet he, on the other

(*d*) See an awful instance of the effect of conscience on a perjured witness in Chitty's Medical Jurisprudence, 365, 366, note (*g*). If witnesses were more frequently reminded solemnly of the terms of their oath or affirmation, and the nature of its obligation, less frequent instances of perjury would, it is believed, occur. It would be desirable if the oath were administered with more solemnity.

(*e*) The late Lord Kenyon and Lord Ellenborough very frequently animadverted most eloquently and powerfully upon depraved conduct, when established before them, in the course even of a civil cause. But the late Lord Tenterden rarely stepped aside for the purpose, and he assigned as a reason that *public animadversions* on the conduct of an attorney, or party, or witness, had sometimes occa-

hand, may be apprehensive that the consequences might occasion utter ruin to the individual and his family, and which the humanity of the judge may induce him to forbear to observe upon; so that he may be assailed by numerous conflicting duties. We will proceed to give a practical outline of the course of proceedings on a trial, collected principally from decisions on the subject.

2dly. Necessity for attendance of principal attorney during trial, his early attendance with witnesses, and of the early attendance of the junior counsel, and why.

2dly. It is advisable in all causes of the least importance or difficulty that the attorney, who has been progressively concerned throughout all stages, should attend the trial, because he will probably be most familiar with the facts and witnesses, and be ready, on any emergency pending the trial, immediately to explain to the counsel any difficulty and suggest the mode of avoiding it, and on that account the costs of his attendance ought in general to be allowed. (*f*) However, it has been held, that where an agent has been employed to attend the trial of a cause in London, it is matter peculiarly for the discretion of the master, whether the costs of a journey to London by the principal country attorney to attend the trial shall be allowed; (*f*) and where an attorney is party to a cause, he will not be allowed the costs of his attendance, unless the necessity for such attendance be established. (*g*)

The attornies on each side having well *arranged and numbered their documentary evidence*, and, in town causes, sent a clerk to bring with him at least the principal witnesses, (*h*) should, at all events, be in Court some minutes before the arrival of the judge, and be perfectly ready to try at the commencement of the day's sittings in London or Middlesex, or at the assizes, however distant the cause may stand in the paper. He should take care to place his witnesses together in a very accessible part of the Court, and request each to observe the evidence that may be given for the opponent, and to communicate to him or his clerk known to such witnesses, when each is prepared to contradict such evidence, and how.

The *junior counsel* also should be ready a short time before the sitting of the Court to receive from the attorney any addi-

sioned utter ruin, or, at least, more severe punishment than his offence deserved, and that, therefore, he abstained from any public censure.

(*f*) *Parslow* v. *Foy*, 2 Dowl. 181.

(*g*) *Leaver* v. *Whalley*, 2 Dowl. 80.

(*h*) On the circuits the plaintiff is bound to have his witnesses in attendance from the commencement of the assizes, and this as well in special jury as common jury causes, and per Parke, J., *I do not think an attorney would do his duty to his client if he had not all his witnesses in attendance from the commencement of the assizes*, *Cosgrave* v. *Evans*, 2 Dowl. 443; *Platt* v. *Green*, *id.* 216.

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tional information that may, as suggested in the conclusion of the last chapter, have arisen since the delivery of the brief and consultation had upon the same; and also be ready to intimate to the proper officer the inexpediency of swearing on the jury one or more named individuals, who may have been discovered to be related to one of the parties, or might be otherwise objectionable, and thus avoid the necessity for a formal challenge. It is also usual, immediately before the jury are sworn in the particular cause, to have any absent witness called three times in open Court upon his subpœna. (*i*) If the plaintiff's attorney be certain that he will not attend, and that without his evidence it is impossible safely to proceed, *then the record should be withdrawn;* but if there be a possibility of recovering without the evidence of the witness, then it may be expedient to proceed; and if, at length, the plaintiff should be obliged to submit to a nonsuit, the costs may be recovered from the absent witness. In case, after the jury have been sworn, the leader has not arrived, the junior should, as long as practicable, delay opening the pleadings, and then pause and request the judge to allow a few moments' indulgence until the leader has arrived; and if, at length, he be directed to begin, he should professedly only open the *formal parts* of the case and evidence in support thereof, leaving the more material points to be commented upon by the leader, in the hope that he will appear in due time to proceed with the most important statement or evidence. A junior may thus avoid the imputation of arrogance or indiscretion, which might otherwise be justly imputed to him prejudicially in the estimation of his brother barristers, as well as of his client.

Precaution not to try a cause out of order.

As a general rule, unless the opponent's counsel or attorney be present and consent, a cause should never be tried out of order, i. e. before all the previous causes have been disposed of; for even in indefensible causes any seeming irregularity in the time of trying very frequently is, for the purpose of delay, made the subject of an application either for a new trial or to set aside the verdict. (*k*)

Withdrawing record or postponing the trial.

If the *plaintiff*, just before the time of trial, discover that he is not prepared in all respects, either in consequence of the unexpected absence of a material witness or otherwise, his at-

(*i*) *Hopper* v. *Smith*, 1 Mood. & Malk. 115.
(*k*) *Aust* v. *Fenwick*, 2 Dowl. 246.

torney must *withdraw the record* before the jury have been sworn, unless in case of sudden illness or accident, upon an affidavit of which, the judge will sometimes *postpone* the trial for a few days, even at the instance of *the plaintiff*, though the general rule is that he must *withdraw the record*. This can in general only be done by the plaintiff's attorney when he entered the record, and it has been decided that a counsel, although retained in the cause, cannot withdraw the record, unless his brief has been delivered; (*l*) so that in that case, unless the plaintiff's attorney be present and withdraw the record in time, the defendant has a right to have the jury sworn, and then to call and nonsuit the plaintiff. (*l*) The withdrawing the record, probably with intent to enter it again and try at a future sittings, will have the same effect, as regards the postponement of the trial, as a motion for that purpose, (*m*) and which is one reason why the Court will but seldom *postpone* the trial on the application of a *plaintiff*, observing that the record is in his own power, though we have seen that there are exceptions; as when a witness has been taken suddenly ill, or met with an accident immediately before the trial, and expected to recover in a day or two, in which case sometimes the judge will permit the trial to stand over.

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Postponements on behalf of a *defendant*. (*n*)

As a defendant cannot withdraw the record when entered by the plaintiff, the judge at nisi prius will in general, upon the production of a very satisfactory affidavit of the materiality of a witness, and that *due* enquiries and endeavours were made *in due time* to subpœna him, but without success; or that he is so ill as to be unable to attend, postpone the cause, upon the terms of the defendant undertaking to pay the costs of the day. (*n*) Such application should properly be made before the jury have been sworn. (*o*)

3dly. The object and utility of speeches of counsel, and considerations

3. In *Courts of Equity* the bill, answer, and affidavits, put the Court in full possession of all the *facts* of the case, indeed, of the *points* on each side, and of the justice or injustice of

(*l*) *Doe* dem. *Crake* v. *Brown*, 5 Car. & P. 315; *Abitbol* v. *Benedetto*, 2 Campb. 487; 3 Taunt. 225, S. C. This requisite of the delivery of the brief has the appearance of a regulation to secure fees to counsel, and it would therefore be a better rule that counsel should not in any case withdraw the record, the same being no part of his professional duty.

(*m*) *Curtis* v. *Barker*, 2 Car. & P. 185; *Ansley* v. *Birch*, 3 Campb. 333; 2 Taunt. 221.

(*n*) What affidavit required, *Attorney General* v. *Hull*, 2 Dowl. 642.

(*o*) *Parkham* v. *Newman*, 3 Dowl. 166, where it was doubted whether an under-sheriff could postpone a trial.

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of the supposed advantage of a reply, and the practical rules on the subject.

the claim, or its resistance, and merely require compression, arrangement, and argument, in a speech, to enable the judge to decide, and which he might be enabled to do by a mere perusal of all the documents. But *at law* neither the pleadings separately nor the entire nisi prius record affords any adequate information to enable the judge or jury to decide what ought to be the proper verdict upon the issues, and hence the absolute necessity for speeches on each side. On the part of the *plaintiff*, to put the judge and jury in possession, at least, of a *primâ facie* right in his favour, and if the defendant neglect to retain counsel to cross-examine the plaintiff's evidence and state his defence; though it might be inferred that in reality he has no defence.

It will be obvious that the *judge*, who has merely the nisi prius record before him, and still less the *jurors*, who have merely received a summons to attend, and have been sworn to try an unknown issue between parties, would not be able to understand or appreciate the object or effect of the evidence adduced before them, unless previously informed, at least, of the *outline* of the facts to which such evidence is intended to apply, and hence the necessity for and utility of *preliminary speeches* of counsel for *each party* before the evidence on his behalf be given.

4thly. When the plaintiff's or the defendant's counsel is entitled to *begin*.(p)

4. In practice the question which party, i. e. whether the plaintiff or the defendant shall *begin, or first address the jury and state the facts of his case*, has much varied, and may perhaps ere long undergo further modification. It is considered important, because in general the party who *begins* will, if his opponent give any evidence, have the *general reply*, or last word to the jury, a privilege which a powerful leader can usually exercise with great advantage; and this is considered of so much importance by leading counsel, that they will sometimes condemn the pleader for not so framing the pleadings as to give him such general reply. The general rule has certainly been, that which natural reason and obvious convenience dictate, viz. that the party who alleges the *affirmative* of any proposition or *issue in fact* should prove it, ***because a negative does not in general admit of the simple and direct proof of which an affirmative is capable***;(q) and, therefore, the

(p) See in general 1 Stark. Evid. 362 to 371; Tidd, 9th ed. 858 to 860; 1 Arch. K. B. 323; 1 Arch. C. P. 168.

(q) 1 Stark. Evid. 362, cites Bull. N. P. 297; Vin. Ab. Evidence, S. a, and other cases, and where see exceptions to this rule.

party who has to maintain or prove the *only* affirmative, or *all* the affirmatives, must *begin to give the evidence;* (r) and yet it will be very obvious, that many cases may arise where it is more easy to prove the negative; as if a defendant plead in abatement that another party *jointly contracted with him*, and that he ought to have been joined, and the plaintiff reply that the contract was *not so jointly made*, he might be able to prove the negative by producing and proving the defendant's *separate* written undertaking to pay. Perhaps the better reason is, that in such a case, unless the affirmative issues be found for the plaintiff, he could not recover any damages, and that it might be a waste of time to inquire into the amount of damages until the issues have been established in favour of the plaintiff. The rule however is so clearly established, that however large may be

(r) *Cotton* v. *James*, 1 Moo. & Malk. 275. per Lord Tenterden—"The rule, as established in practice, is, that when the general issue is not pleaded, *and the affirmative of the issue lies on the defendant, he is entitled to begin.* I do not say that this is the most convenient rule. I am by no means sure that the practice is founded on the best principle, but it is established, and I do not think that I ought to depart from it." See an excellent note of the reporter's, *id.* 278 to 281.

So if in *replevin* the defendant plead property in a third person, and issue be taken thereon, the *defendant* is entitled to begin. Per Alderson, B. and Patteson, J. *Colstone* v. *Hiscolls*, 1 Moo. & Rob. 301.

So in *assumpsit* on a bill of exchange, if the issue on a plea of notice of a fact be on the defendant, he must begin. *Warner* v. *Haines*, 6 Car. & Payne, 666.

So where the *issue* was on the defendant, upon a replication to a *plea in abatement*, denying that the contracts were made by the defendant and others, it was held that the defendant was entitled to begin, because the question *of damages* or amount of claim might never arise, and at least could not arise until the issue had been determined in favour of the plaintiff, *Fowler* v. *Coster*, 1 Moo. & Malk. 241; 3 Car. & Payne, 463, S. C.; but see *Morris* v. *Lolan*, 1 M. & R. 233; and it is a *general* rule that the *onus* merely of *proving damages*, (which, unless where there has been a judgment by *default*, is merely *secondary*,) does not give the plaintiff's counsel a right to begin, because if the *issue* should be found against him, then all the time and trouble in inquiring into the amount of damages would be wasted and useless. 2 Stark. Evid. 2, tit. Abatement; *Badell* v. *Russell*, R. & M. 293; but see *Robey* v. *Howard*, 2 Stark. 555; *Stansfield* v. *Levy*, 3 *id.* 8; and see *Atkinson* v. *Warne*, 6 Car. & Payne, 687; *Carter* v. *Jones*, *id.* 64. So in assumpsit for goods sold, where a plea of coverture was traversed, it was held, that if the plaintiff elect to begin, he must go into the whole of his case, though if the defendant admit the debt he is to begin. 3 Stark. Rep. 178; 2 Car. & Payne, 125; Ry. & Moo. 329, S. C.; Tidd, 859.

But where the defendant to an action by *one plaintiff* pleaded in abatement that the contract was made *with the plaintiff and another person*, who ought to have been joined, and the plaintiff replied that the promise was made *with him alone*, Parke, B. ruled that the *plaintiff* ought to begin, because the affirmative was *then on him*. *Davies* v. *Evans*, 6 Car. & Payne, 619.

In an action of *trespass for taking goods*, the defendant, without pleading the general issue, pleaded that the house of the plaintiff was "within and parcel of the parish of M.," and that he, being a constable, took the goods under a warrant of distress for parochial rates. The replication stated, that the house was not "within or parcel of the parish of M." The plaintiff's counsel claimed the right to begin, as they had to prove the demand of perusal and copy of the warrant. This the defendant's counsel *offered to admit*, and thereupon Denman, C. J. ruled that the *defendant* had the right to begin. And in the ensuing term Sir J. Scarlett having applied for a new trial, on the ground plaintiff should have begun instead of the defendant, and also upon three other grounds, a rule upon the former point was refused. *Burrell* v. *Nicholson*, 6 Car. & Payne, 202, 205.

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the claim for damages, and however important it may be that the plaintiff should have an opportunity of fully explaining to the jury why they should give a verdict for damages or interest, yet when the *onus probandi* of the affirmative of all the issues are on the *defendant, he* must begin.

But if there be only one affirmative issue for the *plaintiff* to prove, and several other affirmative issues for the *defendant* to prove, then the plaintiff has the preference. (*x*)

So if there had been *judgment by default* as to a part in an action for a libel, as the plaintiff has an indefeasible right to go into proof of his claim for damages, he has in that case *a right to begin,* though the *only issue to be tried* is on the defendant's justification; because by such judgment the plaintiff has acquired an *indefeasible* right to damages upon that part of the case, which cannot be affected by the result of the *issue.* (*y*)

Exceptions in actions for injuries to the *person.*

It was observed by Mr. Justice Taunton that *on principle* a defendant ought not to be allowed to begin and have the general reply, merely by pleading some plea which may be very remote from the merits. (*z*) Probably that reason with others induced the judges recently to introduce *an exception* to the general rule in actions for *libel, slander, malicious prosecution, and other actions for injuries to the person;* and we find from a recent case, that the fifteen judges resolved that *the plaintiff shall begin* on the trial in all actions for *injuries to the person,* as *libel* and *slander,* although the general issue may not have been pleaded, but only a special plea, the affirmative of which is on the defendant; (*a*) and Taunton, J. observed, "I do not see any hardship in the rule, (i. e. such *modification* of the *general rule,)* as it is most reasonable that the plaintiff who brings the case into Court should *be heard first* to state his complaint;" (*a*) and the reporters there stated in a note to the same case, that the judges were considering whether the rule should not be extended so as to entitle the *plaintiff* to begin in *all* cases. (*a*) And there was a subsequent case at nisi prius in which it was supposed that when a plaintiff seeks to recover damages, he has a right to begin. (*b*)

But the exception is limited.

But the general rule still continues the same in all actions, excepting those strictly for injuries to *the person,* as above

(*x*) *Jackson* v. *Hesketh,* 2 Stark. Rep. 521; see observations thereon in *Cotton* v. *James,* 1 Moo. & Malk. 279.

(*y*) *Wood* v. *Pringle,* 1 Moo. & Rob. 277.

(*z*) See *Carter* v. *Jones,* 6 Car. & P. 65; and see observation of Lord Tenterden, *ante,* 873, note (*r*).

(*a*) *Carter* v. *Jones,* 6 Car. & Payne, 64, S. C.; 1 Moo. & Rob. 281, S. C.

(*b*) *Brescoe* v. *Roberts,* Kingston Assizes, 3d April, 1835, coram Lord Denman, C. J.

That exception has not as yet been extended beyond the particular instances of actions for injuries to the *person*, and in all other actions continues the same as *ante*, 872.

enumerated, and in one of the very latest cases, which was an action of *covenant* for non-performance of a contract under seal relating to the sale of an innkeeper's business, and the defendant had pleaded that the deed was obtained by fraud, upon which the only issue was joined, and the damages were unliquidated, and Wilde, Serjt. for the the plaintiff, therefore claimed the right to begin, Tindal, C. J. said, that this case was not within the above mentioned exception laid down by the judges, which only applies to actions for *libels, words, malicious prosecution*, and similar cases; and that as the affirmative was on the *defendant, he had* the right to begin; and it will be observed, that in this case the question of damages could not arise, unless the issue was found for the plaintiff, and it might, therefore, be a waste of time first to inquire into such damages.(*c*) So very recently it was determined, that in an action on a bill, where the defendant had pleaded that he had received no consideration, on which issue was joined, that the defendant, and not the plaintiff, should begin.(*d*)

So in another case, subsequent to *Carter* v. *Jones*, in an action on a promissory note by the payee against the maker, where the defendant had pleaded that he had not any consideration for making the note, and the plaintiff replied, that the defendant had value, Parke, B. ruled that the *defendant* should begin, because the presumption of law is that the maker has received value, and it is incumbent on him to prove the contrary ;(*e*) and in a following case, where, in addition to a count on the bill, there was a count upon an account stated, to which non assumpsit was pleaded, and there was a plea of nonpayment in satisfaction of the bill stated in the first count, and issue thereon, the same judge ruled, that unless the plaintiff had some evidence to adduce in support of the common

(*c*) *Reeve* v. *Underhill*, 6 Car. & Payne, 773; and see 9 Legal Observer, 16th April, 1835.

(*d*) *Jacob* v. *Hungate*, Exchequer, Westminster, 28th April, 1835. This was an action by the plaintiff, as last indorsee, against the defendant (Sir William Hungate) as acceptor of a bill of exchange, to which the defendant pleaded that he accepted the bill, and delivered it to the drawer for the purpose of getting it discounted, and that he received no consideration for it, and that the drawer indorsed it without consideration. The plaintiff replied that he gave consideration for the bill. At the trial before Parke, B. at Guildhall, the learned judge held that the defendant ought to begin and prove his case before the plaintiff should be put to prove that he gave value for the bill. There was a verdict for the plaintiff, to set aside which a rule nisi was obtained last term by Mr. Humfreys, and Bompas, Serjt. showed cause against the rule which Mr. Humfreys supported ; but Lord Abinger said he thought it was right that the defendant should begin, and the Court held that there was no ground for setting aside the verdict, and discharged the rule. Judgment for the plaintiff.

(*e*) *Homan* v. *Thompson*, 6 Car. & P. 717 ; and see *Mills* v. *Oddy*, 6 Car. & P. 728, 729, coram Parke, B. to the same effect.

count, the defendant should begin; (*f*) and if in an action on a bill the alternative of an issue be on the plaintiff as to his notice of a fact, the defendant is to begin. (*g*)

In Replevin.

In *Replevin*, if there be merely an avowry or cognizance for rent, and a plea in bar of non tenuit, the plaintiff's junior counsel opens the pleadings, but the defendant's leading counsel states the case, as the proof of the affirmative is upon him, and no question as to the extent of damages to be recovered by the plaintiff can arise, unless the issue has been first determined in his favour; but if the affirmative is on the plaintiff, then, as in other cases, he is to begin. (*h*)

The practice in Ejectment.

In Ejectment, as the *general issue* is always pleaded, and the issue joined always imposes the *affirmative* upon the plaintiff, he is properly to begin; but a practice has long prevailed of allowing the defendant to begin and to have the reply, *provided he will admit the whole of the lessor of the plaintiff's primâ facie case*, that is, that the plaintiff is entitled to recover, unless the defendant succeeds in establishing his particular ground of defence. But *the defendant's counsel has no right to the general reply, unless he admits the whole primâ facie case* of the lessor of the plaintiff; and therefore, where the counsel for the defendant only admitted the pedigree of the lessor of the plaintiff, and his counsel proved the seisin of the ancestor by receipt of rent, which case was answered by setting up a will, the validity of which was disputed by evidence on the part of the lessor of the plaintiff, it was held that the defendant's counsel was not entitled to the general reply. (*i*)

But where the lessor of the plaintiff claims by a title which is *entirely admitted* by the defendant as a sufficient primâ facie case, but the defendant claims under a different title, destructive of that of the lessor of the plaintiff, as where the latter claims as heir and the defendant as devisee under a will which is impeached by the lessor of the plaintiff, (*j*) or where the plaintiff claims under a will, and the defendant under a subsequent codicil altering such will, (*k*) the defendant, *if he admit the whole of the plaintiff's claim*, subject to be thus defeated, is to begin. (*l*) But when both parties claim as heir, and the real question is as to the legitimacy of the defendant, who is clearly heir if legitimate, although he propose to admit that unless he

(*f*) *Smart* v. *Rayner*, 6 Car. & Payne, 721.

(*g*) *Warner* v. *Haines*, 6 Car. & Payne, 666.

(*h*) *Curtis* v. *Wheeler*, 4 Car. & P. 196; *Williams* v. *Thomas*, *id.* 234.

(*i*) *Doe* d. *Pile* v. *Wilson*, 6 Car. & P. 301; 1 Mood. & R. 322; S. C. *Doe* v. *Banes*, 1 Mood. & R. 386.

(*j*) *Goodtitle* v. *Braham*, 4 Term Rep. 497; *Jackson* v. *Hesketts*, 2 Stark. R. 519.

(*k*) *Doe* v. *Corbett*, 3 Camp. 368.

(*l*) *Robey* v. *Howards*, 2 Stark. 555.

be legitimate the plaintiff is entitled as heir of the person last seised, such admission will not give the defendant the right to begin, because the proposed admission does not admit the *whole* of the plaintiff's title, as in the other cases. (*m*) And a defendant has no right either to *begin*, or to the general *reply*, unless he admit the *whole primâ facie case* of the lessor of the plaintiff. (*n*) So where the plaintiff claimed as heir, which would render it essential for him to prove that his ancestor *died seised*, and the defendant only offered to admit that the plaintiff was *heir*, but relied on a conveyance executed by the ancestor, which, if valid, would establish that the latter did not die seised, it was held, that as the defendant would not admit *the whole* of the plaintiff's *primâ facie case*, he was not entitled to the reply. (*o*)

Defence under statute giving the general issue.

Where a *statute* gives the general issue, and allows the defendant to give in evidence all special grounds of defence, the plaintiff, under that plea, has primâ facie the right to begin, though perhaps, if the defendant's counsel will admit a primâ facie case, and that the plaintiff has served the requisite notice or demand, it might be otherwise.

Suggested objection to a defendant's claiming to begin and reply, merely because he offers to make admissions on the trial.

Perhaps when the *pleadings* have apprized both parties that the affirmative issue is only on the defendant, it may be expedient that *he* should have the right to *begin* with his statement and the evidence in proof of that affirmative; but when, according to the *pleadings*, there is any issue or certain claim for damages that must in any event be proved by the plaintiff, it seems very inconvenient and objectionable that a defendant's counsel should, by a sudden and unexpected admission, for the first time at nisi prius, even of the whole of the plaintiff's primâ facie case, have the power of obtaining the advantage of the *first speech*. (*p*)

Incorrect ruling of the judge as to who shall begin is no ground of motion for a new trial.

It has been considered that the right to begin is so much in the discretion of the judge on the trial, that the Court in banc will not grant a new trial on the ground that he has ruled incorrectly. (*q*)

5thly. Of the junior's opening the pleadings.

5. The province of the *Junior* is to state or *open*, as it is technically termed, *the pleadings*, and which he should do

(*m*) *Doe* v. *Bray*, 1 Mood. & Mal. 166.

(*n*) *Id. ibid*; *Doe* v. *Wilson*, 6 Car. & P. 301; *Doe* v. *Tucker*, 1 Mood. & M. 536, S. P.

(*o*) *Doe* v. *Tucker*, 1 Mood. & Mal. 536.

(*p*) But yet the practice in *ejectment*, *ante*, 876; and indeed in *trespass*, *ante*, 873, n. (*y*); *Barrel* v. *Nicholson*, 6 Car. & P. 202, 205, seems to be established that if the defendant's counsel admit the whole of the plaintiff's *primâ facie* case, *the defendant's* counsel has a *right to begin*.

(*q*) *Barrell* v. *Nicholson*, 6 Car. & P. 205; 1 Mood. & Rob. 304.

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concisely, but very distinctly and perspicuously; and when they are long or complex, he may properly close his statement with an enumeration of the precise issues to be tried, as thus: "On "these pleadings the issues are; 1st. Whether the defendant "committed the trespasses in the plaintiff's land; 2dly, Whether "the plaintiff was then in possession of such land; 3dly. "Whether the defendant had right of common of pasture for "sheep there; and, 4thly. Whether the plaintiff gave the de-"fendant license or leave to commit the trespasses." We have seen that in general it is not advisable to describe the *terms* of a libel or verbal slander, but merely to state "The declaration "is for *a libel*," (or for two or more libels, or for "*verbal slander*," not stating the particular words;) "the defendant has pleaded not guilty, and a justification that the libel or words were true; and which allegation the plaintiff has denied." This will suffice, for the statement by the junior of the terms of the libel or words, which must be afterwards proved with particularity, would be of no real utility, and might, as before observed, prejudice the case. (*q*) With respect to a *set-off*, a difference has existed in practice; but the better course, whether the set-off has been pleaded or only notice thereof given, is equally to state the same, so that the judge and jury may know to what points they may have to direct their attention. (*r*)

The Junior counsel's other duties connected with the trial.

But the junior should in no case state any fact, or attempt to encroach on the department of the leader, even in a single sentence. At the same time, he should always be master of the case, and have considered it in all its bearings, and have anticipated the possibility of illness or absence of his leader, so as to be able instantly to state and conduct the whole case without apparent embarrassment. This habit and constant preparation will always be a useful exercise, and in the course of time may become of the greatest advantage; so he should *always be prepared to reply*, as the leader may occasionally be called away by other duties; and these are the opportunities which sometimes make the fortune of an attentive junior: but, however talented and experienced the junior may be, his most discreet course is never to act independently of his leader, but to suggest to him every material point, whether of law or fact, and in no case without his concurrence, still less contrary to his judgmont, to insist on any point, or urge any objection, until after the leader has exhausted his observations, and requested him to

(*q*) *Ante*. (*r*) And see *Delauney* v. *Mitchell*, 1 Stark. 439; *Rees* v. *Smith*, *id.* 31.

state his views, if argument be absolutely required, at Nisi Prius, but not otherwise. Indeed, if a junior counsel at nisi prius take ever so well-founded an objection, but which his leader gives up, the Court in banc will not entertain it on discussing a rule for a new trial; (s) and if the leader take one line of case contrary to the opinion of the junior, the Court in banc will not permit the latter to obtain a new trial upon the ground that he was prepared with evidence to support another line of case, but which his leader disclaimed. (t)

Taking notes, &c.

It is a very important branch of the duty of a junior counsel to observe that the leader *has opened all the plaintiff's claims*, or when counsel for *a defendant, all his grounds of defence*, and to see that the evidence of each witness favourable to the client has been exhausted; and if he apprehend that the judge has not taken a full note of such evidence, he may request his leader to ascertain from the judge whether he has noticed the same. (u) The junior should also take as full notes as practicable of the heads of his leader's opening speech, and of that of the defendant's leader, and of all the evidence on each side, and all points and objections made; and as he proceeds, he should mark in the margin of his notes every material part, so as to be able at an instant to state the precise evidence to his leader, or to the judge, if required. When it is probable that a witness will afterwards be called to contradict particular terms of conversation, then the very exact words as used by the witness, and in the very tense, should be taken down. Every word of the judge's observations on the evidence, or the law applicable to the case, and in particular of his directions to the jury, should be thus secured. These may not only assist the leader during the trial, but also be most important on moving for a new trial; because we have seen that credit is given to the notes of counsel of what has occurred, (x) except, indeed, when they vary from the notes of the judge, which are always conclusive. (y) The leader and other counsel, when there are three, also take down the evidence, and indeed it is most essential, whilst a witness is under the examination of the junior, who cannot conveniently write down the evidence of a witness whilst he is examining him.

The attornies also to take notes.

The attornies on each side will also do well, at their joint expense, to employ a short-hand writer to take down the whole of what transpires during a cause, or if the case will not afford

(s) 3 Taunt. 531; 4 Taunt. 779.
(t) 4 Taunt. 779.
(u) See the necessity for this precaution, *Adams* v. *Bankart and others*; *post*, " Of recalling a Witness, &c.
(x) *Ante*, 535, 536.
(y) *Adams* v. *Bankart and others*; *post*, " Of recalling a Witness.

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that expense, then clerks who are accustomed to write expeditiously should take full notes. When a witness for the opponent unexpectedly gives evidence unfavourable to the client, he should immediately inquire of any favourable witness, who it is expected was present at the alleged transaction, whether he can contradict such unfavourable evidence, and take care immediately to intimate the result to the leader, so as to enable him to call the witness in reply.

6thly. The *opening* speech for a plaintiff. (z)

The general consideration.

6. The *opening speech* is so entirely in the discretion of the leading counsel, and it is so important for the interests of the client that he should be very rarely *interrupted*, that it might seem to be of little utility here to notice any rules respecting it, excepting that it may be of essential importance that the junior counsel and the attorney should, immediately before the conclusion of the opening speech, hint to the leader, in the manner presently suggested, *any omission or mistatement* that, if unnoticed, might prejudice the client, and which should in that case certainly be *fearlessly* communicated, (in general by the principal attorney, who should station himself immediately under or near the leader), before he sits down as having closed his speech. (*a*)

In general, the leader has *first* to consider whether, from the facts and weight of evidence in support of his own case, and the nature of the expected defence, and the talent and experience of the leading counsel for the defendant, the latter *will probably give evidence* (so as to entitle the plaintiff's counsel to a reply) or will not call evidence, but rely on his speech to the jury, in the hopes of obtaining a verdict, or very materially reducing the damages, as very frequently occurs in actions for slander or assault, or other personal injury, and where, in point of law, there cannot be any complete defence. If it be expected that the defendant will, by calling evidence, *give the plaintiff the reply*, the opening speech is usually more general and less impressive; but if a reply be uncertain, it is at least *more satisfactory to the client to have his case fully and energetically pressed in the first instance*, anticipating and refuting all arguments that can be urged by the defendant's counsel in defence or mitigation of damages. Thus, in an

(z) It must be understood that the author has wholly abstained from any observations on the opening speech, except those of a *practical* nature.

(*a*) I say *fearlessly*, because, from want of firmness in this respect, some causes have been lost. I believe, without exception, the leaders of the present day are free from irascibility, but in the early part of the author's practice it was not unfrequent, when a certain leader was what he considered *improperly* interrupted, that he floored the client with a bundle of heavy briefs.

action for crim. con., besides all other topics, the plaintiff's counsel will perhaps anticipate the argument that the defendant has no income or property, and that it would be harsh to imprison him for life by a verdict for large damages: in that case the plaintiff's counsel would entreat the jury not to be influenced by any such certainly fallacious argument and why.

The several parts of such speech.

The *opening address* usually states, *first*, the full *extent of the plaintiff's claims*, and the circumstances under which they are made, to show that they are just and reasonable; *secondly*, at least an outline of the *evidence* by which those claims are to be established; *thirdly*, the *legal grounds and authorities* in favour of the claim or of the proposed evidence; *fourthly*, an *anticipation* of the *expected defence*, and statement of the grounds on which it is futile, either in law or justice, and reasons why it ought to fail. The general utility of such arrangement will be collected from the following observations.

First, The plaintiff's claims.

First, As regards the statement of *the plaintiff's claim or claims*, there are several reasons why *all* should in the *first instance be stated*, or at least all which the form of the declaration has embraced; (*b*) *first*, because if any item of claim be unnoticed in the preliminary address, when it is not *necessarily involved or included in the plaintiff's claim*, (*c*) the defendant's counsel might suppose that the plaintiff, for some good reason, had resolved to abandon the subordinate unnoticed claim, and therefore would properly forbear to cross-examine the plaintiff's witnesses, or himself to give evidnece to defeat such claim; and secondly, that the judge and jury ought also to be informed in the *first instance* what items the plaintiff proceeds for, so as to watch the evidence, and ascertain whether there be any proof adduced in support of the claim, and that the judge, having the point brought to his attention, may direct the jury upon the propriety of a verdict for or against it; *thirdly*, because it is essential that the proceedings should be conducted in due order, and that a plaintiff's counsel should not be allowed, at *any stage* of a cause, to bring forward a further claim: for if *he* were allowed to do so, and make new cases *gradatim et seriatim*, a *defendant* would have an equal right at any time to start a new ground of defence, and there would consequently be no end of confusion. (*d*) The general sound rule, therefore, cer-

(*b*) See the leading case of *Penson* v. *Lee*, 2 Bos. & Pul. 332, and the reasons there assigned by the Court.

(*c*) As might be the case, as to the claim to *interest*, in an action on a promissory note payable on the face thereof, *with interest* from the date, *or according to occasions*, the claim to the premium paid on effecting an insurance, in case the claim for a loss should fail, because the ship turned out not sea-worthy.

(*d*) *Penson* v. *Lee*, 2 Bos. & Pul. 332.

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tainly is, that after the leading counsel has closed his opening speech, or at least after he has closed the examination of a witness, he is not to be allowed *to state* a new claim, or *to prove it*, with a view to obtain a verdict for more than he originally claimed. (*e*) Thus, where the leading counsel only opened a claim on a bill of exchange, the judge would not afterwards allow him to state or prove a claim for money lent under the common counts; (*f*) and although in an action on a policy of insurance for a total loss, with a count for money received to the plaintiff's use, the Court of C. P., after consulting Lord Kenyon, held, *that as the practice was so in insurance causes*, the plaintiff might have a verdict for the premium, although his counsel had not mentioned the claim until after the jury had retired, yet the judges considered that particular practice against *general principle*, and said, "We hope that *the plaintiff's counsel will in future demand the premium in his opening, where he means to insist upon it.*" (*g*) In the opening also the statement of the case should *precisely accord with the proposed proof;* and after opening and proving a *joint trespass* against all the defendants, the plaintiff cannot abandon that case and prove a *separate trespass* against some or more of them. (*h*) It can rarely occur that any loss to the plaintiff can ultimately be sustained by a rigid adherence to this rule; for if there really be a distinct claim omitted to be claimed, a fresh action might afterwards be sustained as regards that item. (*i*) However, in cases where no injustice or great inconvenience would result, and the omission has arisen not from a defect in the brief, but from the *inadvertence of counsel*, some exceptions have been allowed; (*k*) and a witness has been called back where a counsel inadvertently has omitted, at the proper time, to ask of him a question, though hot so in general in favour of a penal action. (*k*)

Sometimes the leading counsel for the plaintiff, apprehensive that the setting up a claim for the return of premium, (*l*) or return of a deposit, might prejudice the jury against the larger

(*e*) *Id. ibid;* Per Le Blanc, J. in 1 East R. 614, 1 Stark. Ev. 2d ed. 370; *Rees* v. *Smith*, 2 Stark. R. 31; *Williams* v. *Davies*, 3 Tyr. 383.

(*f*) *Paterson* v. *Zachariah*, 1 Stark. R. 72 *acc.*; but see *Murray* v. *Butler*, 3 Esp. R. 105, *semble contrà.*

(*g*) *Penson* v. *Lee*, 2 Bos. & Pul. 330.

(*h*) *Tait* v. *Harris and two others*, 6 Car. & P. 73; 1 Mood. & R. 318, S. C.

(*i*) 6 Term Rep. 607; 3 Wils. 304; 3 Bar. & Cres. 235.

(*k*) *Alldred* v. *Halliwell*, 1 Stark. R. 117; 1 Stark. Ev. 370; *Giles* v. *Powell*, 2 Car. & P. 259; *Southy* v. *Peckford*, 2 M. & P. 545, and see observations of the Court as to the propriety of indulgence to counsel in *Penson* v. *Lee*, 2 Bos. & Pul. 333.

(*l*) See observation of Lord Eldon in *Penson* v. *Lee*, 2 Bos. & Pul. 330.

claim for a total loss under an insurance, or for larger damages in an action against a vendor for not completing his contract of sale, will purposely omit to mention such smaller claims, upon the supposition that if they were made, the jury would infer that the plaintiff was sensible he could not sustain his larger claim; and if that motive be discovered, as there was no *inadvertence*, but a purposed omission, there is no reason why the plaintiff should be indulged. It will be observed, that in cases of this nature skilful leaders will incur neither prejudice nor hazard, but will perhaps *begin* by observing, that the sufficiency of a defence may frequently be estimated by the discretion in conducting it, and that the defendant is at all events in error, because he has not paid into Court the amount of premium, but attempts to keep that in his pocket, as well as withholding the sum insured, and that the plaintiff is at all events entitled to a verdict for such premium; but that the plaintiff puts his case principally on the higher ground, and proceeds for a total loss, and then states and *closes* his observations by fully urging the right to the full compensation for his loss, and thus, as far as observation can go, securing a verdict and avoiding all prejudice by thus very lightly adverting to the claim for the premium in the early part of his address.

When a *set-off* has been pleaded, the safest course is for the plaintiff's counsel to open the full extent of his claim, stating all the items and the evidence by which he is prepared to prove it, but proposing, subject to the directions of the learned judge, to confine *his evidence* in the first instance to the proof of items sufficient to establish the sum he seeks to recover, instead of going into full proof of every item of his whole claim, which may or not be necessary, according to the extent of proof of the defendant's set-off. But in such case the counsel should ascertain, before he closes his case, whether the judge will allow him to give evidence of the debt, in answer to any proved set-off, after the defendant has called his evidence. (*m*) Lord Lyndhurst, C. B. observed, " the consequence of making it imperative on the plaintiffs to produce their whole claims in the first instance would be, that if they had long accounts, containing many items, and extending over several years, the whole must be gone through, as it would afterwards appear, without occasion. One course or the other must be adopted, according to the nature of the case, and the presiding judge can form the best opinion at the time whether the evidence

(*m*) *Williams* v. *Davis, Gent., one, &c.* 3 Tyr. R. 383; 1 Cromp. & M. 464.

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should be admitted or rejected at the particular moment when it is offered."(n)

When the plaintiff's claim consists only of two or three considerable items, then it may be advisable, in the first instance, to go through the full proof of such debts to the plaintiff. (n)

Moreover, when in an action of trespass the declaration contains only one count for one assault and battery, when in fact there have been two distinct assaults, the plaintiff's counsel must take care *to open* that on which he afterwards means to rely and prove; for after describing, and still more after attempting to prove, one assault, he cannot abandon it and proceed to prove another. (o)

When a counsel is perfectly satisfied that in point of law his client is not entitled to recover a particular item, and that his attempts to recover it will be futile, and only lead to a new trial and consequent delay and expense, it is *now* considered due to the judge and the administration of justice, not to attempt to obtain a verdict for it; and at all events, if the counsel knows that he has no evidence to sustain a claim, it is considered most correct not to open the same as one of the items for which he proceeds. (p)

Secondly, Observations on the plaintiff's expected evidence.

Secondly, It is usual also in the opening address to state the *substance* or outline of the *Evidence* which it is expected will be adduced in support of the plaintiff's claims, with explanations calculated to remove any doubt that might arise on the effect of such evidence; but the extent of such opening statement must vary in every case according to the particular facts and the expectation of the defendant's giving evidence, so as to entitle the plaintiff's counsel to the reply. It is considered to be in general advisable not to pledge any particular course of proof, but to leave the same as open as practicable to any evidence that may arise; because, if precise evidence be pro-

(n) *Williams* v. *Davis*, 2 Crom. & M. 464; 1 Dowl. 647, S. C.; *Brown* v. *Murray*, Ry. & M. 254; *Rees* v. *Smith*, 2 Stark. 31.

(o) *Stante* v. *Pricket*, 1 Camp. 473.

(p) But there have been exceptions in practice. The late Mr. Marryatt related an anecdote of a celebrated leader on the Western Circuit, who in consultation, in answer to Mr. Marryatt's observation that a part of the plaintiff's claim was not sustainable, for there was no *legal* evidence in support of it, replied, "Ah, my boy, I am glad to see you are a good lawyer, but I think I shall contrive to *make it evidence in my speech to the jury*." And an eminent leader on the Home Circuit, (whose client had been nonsuited by a variance on the first trial, and paid 70*l*. costs,) by observing to the jury on the second trial, on the hardship of such nonsuit and consequent expense, notwithstanding the remonstrance of the judge upon the irregularity of the observation, induced the jury to give a verdict for damages, *including such costs*. But in the result, and on a motion for a new trial, he was obliged to give up such costs, so that such irregularity was of no avail, and certainly was derogatory of professional conduct.

mised, and there be afterwards any material deviation or failure, a jury are apt to suspect that the case is full of errors. Upon this subject some excellent observations have been made. "The counsel for a plaintiff labours under a disadvantage in commenting upon his evidence before it has been given; it is frequently hazardous to lay much stress upon facts which afterwards may not be proved; and it not unfrequently happens that the proof varies so much from the statement as to render his comments and inferences irrelevant, and sometimes even injurious;" (q) and the defendant's counsel will of course observe to the jury on the discrepancies in the plaintiff's case. In general the plaintiff's leading counsel has acquired some knowledge of the habitual accuracy or inaccuracy of the attorney, and if it be favourable, so that he can venture to conclude that such attorney has *himself* examined the evidence, he may then be more firm or explicit in his statement of the evidence, and hence the expediency of the principal attorney examining the witnesses and stating that fact accordingly in the brief, so that the counsel may know how far they can confide in his accuracy. When a distinct admission by a defendant can certainly be proved, the just weight of evidence of that nature will be fully pressed upon the jury.

Thirdly, Anticipation of points of law.

Thirdly, Supposing that it is certain a question of law relating to the right of action or the defence must necessarily arise, and that the plaintiff's counsel expects that by *anticipation* he may induce the judge to take a favourable view of the point, he may, by very concise allusions to rather than formal argument upon authorities, endeavour to satisfy the judge in favour of the plaintiff, and at all events convince the jury that justice and reason are in his favour, and that they ought reluctantly to give effect to any adverse law. (r) But it would be indiscreet to suggest any legal difficulty that probably might not occur to the judge or opponent's counsel; and in no case should a leader in Court betray the least want of confidence in his own case, for his client has a right to his most energetic assistance, and the instances are innumerable where able leaders have obtained and retained verdicts contrary to their own expectation, not unfrequently even contrary to the opinion of the judge as regards law and justice in its application to the particular case.

(q) 1 Stark. Evid. 2 ed. 365, n. (h).

(r) *Plunkett* v. *Cobbett*, 5 Esp. R. 136.

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Fourthly, Anticipation of expected defence, and evidence in support of it.

Fourthly, The opening speech also very much depends on the *expected line of defence*, as whether it is expected that the defendant's counsel will rely upon some legal objection, either as regards the law applicable to the plaintiff's case, or to the insufficiency of his evidence, also relying upon his own speech to the jury, and will not give any evidence for the defendant; or whether he will give evidence, and thereby entitle the plaintiff's counsel to the reply. If the former be expected, then if it be *certain* that the defendant's counsel is aware *of all the legal objections*, it may be advisable for the plaintiff's counsel to anticipate, argue against, and condemn such objections, as neither founded in law nor in justice. (*s*) But unless it be quite certain that a particular legal objection will be taken, it is considered most discreet not to allude to it in the opening, because it has frequently occurred that anticipations of supposed objections have suggested the same for the first time to the opponent, and have thus raised a difficulty that might never have occurred.

As regards anticipation of any *defence* on *facts*, and when evidence will be called by the defendant, and the plaintiff thereby entitled to a general reply, the plaintiff's counsel is at liberty, whether such defence be fully known to him or not, either in the first instance to state and enter into the whole of his case or only to make out a *primâ facie* case, and to reserve his answer to the defendant's case for his reply, and in general the latter is considered the safest course; because by entering into the full defence in the opening speech and in evidence many hints useful to the defendant's counsel may be suggested, so as to enable him to improve his own case; as if the action be on a bill of exchange against the acceptor, and the expected defence be the want of consideration received by the defendant or given by the plaintiff; (*t*) and the plaintiff cannot answer part of the defendant's case in his opening, and reserve the next for his reply. (*t*) In a few cases however it may be advisable shortly to anticipate the defence and the witnesses that will be called in support of it; as, for instance, the counsel for the plaintiff may state his conjecture that though in reality there is no defence, yet he expects it will be attempted to put the plaintiff out of Court by the defendant's attorney's clerk proving

(*s*) The fallacy of many such defences may thus by anticipation be exposed and annihilated, when otherwise the defendant's counsel, by making an impression on the judge, he may for a time rule erroneously and render necessary an application to the Court.

(*t*) *Williams* v. *Davies*, 1 Cr. & M. 464; *Brown* v. *Murray*, [illegible] & M. 254; *Sylvester* v. *Hall*, id. 255, overruling *Rees* v. *Smith*, 2 Stark. Rep. 31; 1 Arch. C. P. 169.

some admission, and state his reason for that conjecture, by observing from the cause list the name of the defendant's attorney, and that he has previously known that a clerk of that attorney has on former occasions ventured to prove some such admission, but which, after two or three attempts, previous juries have of late disbelieved; thus putting the judge and jury in possession of the probable defence, the injustice of which the jury are thus enabled to suspect and duly appreciate.

Counsel's privilege of speech.

It is essential to the due administration of justice that a counsel should be privileged and protected in the energetic discharge of his professional duty, and in stating supposed facts pertinent to the cause and stated in his brief or instructions, and in commenting fairly on the facts of the case; and he may use strong epithets, however derogatory to the character of the opponent or his attorney, or other agents, in bringing or defending the action; for if he were subject to an action for uttering such abuse, whether true or not, the mere liability to be harassed with numerous actions would cramp if not destroy the energy of counsel, so essential to the welfare of the client, and which is indeed highly useful to society, since the exposure by counsel of villainy or misconduct is very conducive to its decrease; and therefore where a counsel, in pursuance of the instructions in his brief, stated, "That the plaintiff's attorney "was a fraudulent and wicked attorney," referring to the attorney's having brought the action for a sum of money to which it was insisted he knew the plaintiff was not entitled, it was held that the counsel was not liable to be sued, whether the assertion were true or false.(u) In general however it is hazardous, and may be very injurious to the client, to instruct counsel to abuse a particular individual; for the jury, and sometimes the judge, will openly express their displeasure when the abuse has not been fully warranted by the course of the cause; and it is not so much the practice as heretofore to step aside to animadvert upon the conduct of a party or his witness; and in modern times, there are very few instances of what was formerly termed *browbeating*. Indeed counsel should be always cau-

(u) *Hodson* v. *Scarlet*, 1 Bar. & Ald. 232; and see very fully *Robertson* v. *Graham*, 3 Dow's Rep. in Lords, 273, 277, 279; 7 Bing. 459.

In *Blanchard* v. *Cawthorne*, Linc. Inn Hall, 30th Aug. 1831, Lord Chancellor Brougham observed, "I dismiss the motion, (i. e. dismiss the Vicechancellor's order for appointment of a receiver, &c.) *with costs*, on this ground; I consider that there was considerable imputation cast upon the character of the *professional defendant and gentleman* (Mr. Harrison.) I do not say *improperly* cast, because there was *something* which required explanation; but nevertheless, when such imputations are cast, costs are always given, and almost of course."

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tious in avoiding what might be termed insulting a witness. Many jurors have declared that in doubtful cases, and especially when considering damages, they have frequently founded their verdict on the indiscretion of counsel alone. The judge, however, will sometimes endeavour to remove any prejudice to the client on account of any such want of judgment in his counsel.

Junior Counsel and attorney to observe the opening and be prepared with hints.

It is very important that the junior counsel and the attorney should attentively observe the opening address of the counsel, so as to shape the subsequent conduct of the cause accordingly. It will also be particularly essential that each should observe whether the leader has stated every part of the plaintiff's claim, and if it be certain that any material point has been omitted, then, but not until the instant before the leader is about to close his address, a *hint may be privately given*; but all *open interruption* should be anxiously avoided, and confidence should be reposed to the last that the leader will leave nothing incomplete. Indeed, in general, when a leader entertains the least doubt whether he has omitted any appropriate statement, he will, before he sits down, inquire of his junior, or more generally of *the attorney*, whether any thing further occurs to him to be stated. (x) If the point omitted be very concise, sometimes even a word very legibly written would suffice; as, suppose the claim for interest has been omitted, the words, "*Interest, £——*," on a slip of paper would instantly induce the leader to add that claim; or in an action on a policy of insurance on ship, with a count for money had and received, to recover back the premium, the word "*Premium £——*;" (y) or in an action against a vendor, for not making a sufficient title to the plaintiff a purchaser, with a count for money had and received, to recover the deposit, the word "*Deposit, £——*;" or where a set-off has been pleaded, if in notice, "*Further, claims to cover set-off, if proved.*"

7. Of plaintiff's counsel giving evidence and calling witnesses, and the usual course of adducing the same.

7. The opening speech having been closed, the next senior counsel begins *the examination of the evidence*. In general formal proofs are *first* adduced; *secondly*, the documentary evidence; (z) *thirdly*, examination of witnesses *under interroga-*

(x) As in general the attorney in a cause must be better informed of the *facts* than any counsel, a leader will consult *him* as to facts, and he ought to be able instantly to answer every question upon them; and he should place himself immediately under his leader, so as to be ready to communicate.

(y) *Penson* v. *Lee*, 2 Bos. & Pul. 330.

(z) If there be a doubt as to the sufficiency of the stamp it is advisable, in a long *town* cause, to put in docu-

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tories, and *lastly* the *viva voce* evidence by *witnesses*. With respect to documentary evidence, we have seen, that to save expense, the Reg. Gen. Hil. T. 4 W. 4, reg. 1, sect. 20, enables either party to require his opponent to agree to *admission of such documents*, or to refuse such admissions at the risk of having to pay the costs of the more expensive proofs, whatever may be the result of the cause; (*a*) such *admission* is therefore usually made in writing, and which is produced, and the handwriting of the opponent's attorney to the signature proved, if disputed; and then the admissions are read and the several admitted documents are handed to the officer of the Court and read, copies of each being first delivered to the judge if required. The judge's order or rule of Court for the examination of witnesses on interrogatories is put in, and the interrogatories and depositions are read. The several witnesses in chief are then successively called.

8. If defendant's counsel examine plaintiff's witnesses on voir dire, and intend objecting to the competency or the *mode* of their examination, when and how to object.

8. As it would be an improper waste of time to permit a witness to be sworn or give evidence, and afterwards to raise an objection to his competency, the general practice is, after a witness has been called into the witness-box, and sworn or affirmed to give evidence, *immediately to make any objection* then known to exist, and which may be on *the voir dire*, or in some cases established by evidence. Formerly, the objection must have been made before the witness *was sworn* in chief; but it has now long been settled that it may be made at any time during the trial; (*b*) especially the objection is not discovered until the witness has himself, in the course of his examination, disclosed his incompetency. If, however, the objection be in respect of a supposed defect in the form of oath, or in the want of religious belief, it should be made at the time the oath is administered. As regards incompetency on account of the witness having been *convicted* of some crime, the record of the judgment of conviction, regularly drawn up, must be produced, (*c*) and even his own admission of having committed the crime will not render him incompetent without proof of his conviction; (*d*) but the usual objection respecting *interest* is in general established by examining the witness himself upon the

ments first; for if it be necessary to send the instrument to the stamp office the judge will sometimes permit the other evidence to proceed in the mean time. *Beckwith v. Benner*, 6 Car. & P. 681.

(*a*) *Ante*, 818, 819.

(*b*) *Turner v. Pearte*, 1 Term R. 717; *Stone v. Blackburn*, 1 Esp. 37; Peake, Ev. 195.

(*c*) See 1 Stark. Ev. 2d ed. 95; *Rex v. Careinion*, 8 East, 77; *Cook v. Maxwell*, 2 Stark. R. 183; *Sharp v. Scoging*, Holt, C. N. P. 541; Bul. N. P. 292.

(*d*) 1 Stark. Ev. 2d ed. 172.

question. (*e*) It would be beyond the limits of this work to investigate this part of the subject more fully.

Whilst witnesses for either party are under examination in chief, the counsel for the opponent must carefully watch the mode of examination; and if there be even the *inception of an irregular question*, the answer to which might be prejudicial, he should instantly interrupt the counsel, because, if he wait until the whole of a leading question has been stated, the mischief may be complete, from the witness having already had suggested to him the answer he is desired to give, and will afterwards, when the question has been re-formed, give the answer accordingly. In like manner, if a witness swear to a fact or conversation, the counsel for the opponent may interpose, and inquire of the witness whether he was present and heard all that passed, or whether the matter was in writing, or whether his information is merely hearsay. (*f*) So he may be asked whether he speaks from recollection or from some note of the transaction, and if the latter, then inquire when it was made; for unless it was made on the very day, or very shortly after, the witness cannot refer to it even to refresh his memory; and unless he can swear that, independently of the written memorandum, he recollects the fact, the evidence will not be received.

Of the imprudence of the plaintiff's counsel persisting in examining a witness, the admissibility of whose evidence is doubtful.

If a witness for the plaintiff be objected to on account of any supposed incompetency, and which is not to be avoided by release or otherwise, the plaintiff's counsel should be well assured that his evidence is in law admissible, before he pertinaciously insists on proceeding with his examination, because if he do so, and on a motion for a new trial the Court in Banc should be in favour of the objection, a new trial will be granted. It is only where there is no other evidence to the same effect, that it is advisable to struggle for the admissibility of a witness, but rather preferable to be content with the other evidence. (*g*)

Examination of evidence in Chief. (*h*)

The leading counsel having closed his address, the *evidence*, then termed *in chief*, is to be given in support of the statement. The evidence should strictly follow and support every part of the plaintiff's case, or perhaps rather the speech should exactly anticipate and correspond with the expected evidence;

(*e*) *Doxon* v. *Haigh*, 1 Esp. 409; *ante*.

(*f*) See *The Queen's case*, 2 Brod. & Bing. 292.

(*g*) *Campbell* v. *Richards*, 5 Bar. & Adol. 840.

(*h*) In 3 Bla. Com. 374, referring to Quintilian, Institut. Orat. lib. 5, chap. 7, it is observed that he lays down very good instructions for examining and cross-examining witnesses *vivâ voce*, and it would be well if students for the bar would study those observations, and afterwards, when attending nisi prius trials, consider how far those rules are or not now observed.

and care must be observed to adduce evidence to support the case which has been opened by the leader. As suppose the brief states two assaults, the one committed in August and another in September, but the leader has opened only the latter, the junior counsel, after assuring himself that the leader has advisedly so opened, must take care to confine the witness to the assault in September, because we have seen that after proving, even in part, one cause of action, the plaintiff's counsel cannot abandon it and proceed to prove another, unless the pleadings and opening extend to both. (*i*) So in an action of trespass against three defendants, after proving a joint trespass, the plaintiff cannot abandon that, and proceed to prove a separate trespass by one. (*k*) If there be three or more counsel, then the next senior to the leader begins with a portion of the evidence, and if the requisite documentary proof is voluminous and important, such second counsel usually, in pursuance of previous arrangement, takes the whole; as where assignees are plaintiffs, and the bankruptcy and their representative character has been put in issue, such second counsel proves the fiat, petitioning creditor's debt, the trading, act of bankruptcy, and assignment to the plaintiff. After the defendant's counsel has exhausted his objections, if any, to this part of the proof, and cross-examined the witnesses called to prove it, the junior counsel for the plaintiff then calls one of the least important of the witnesses for the plaintiff, and it is judicious to arrange that the *leader*, who has in the mean time obtained a short *respite* from his exertion, shall attend and take the most important witness in the cause. It would be extremely injudicious on the part of the junior to attempt to prevent any arrangement so conducive to the welfare of the client, and if he do, he had better suspend his practice till longevity has placed him in the lead, if any client then be found to retain him. At the same time, no leading counsel should, without urgent occasion, take a witness out of the hands of his junior.

Right of leader to take the examination of a witness out of his junior's hands.

The same observation applies to a junior counsel objecting to his leader's taking a witness out of his hands whilst he is under his examination, and which it is settled he has a right to do. (*l*) But after one counsel has brought his examination to

(*i*) *Stante* v. *Prickit*, 1 Camp. 473.

(*k*) *Tait* v. *Harris and others*, 6 Car. & P. 73; 1 Mood. & R. 282, S. C.

(*l*) *Doe* v. *Roe*, 2 Campb. 280; Tidd, 9 ed. 860. "Certainly a junior may apprehend that bystanders may infer, from a leader's taking the examination or cross-examination of a witness out of his hands, that he thereby insinuates that he the junior is inefficient or incompetent to the fulfilment of his professional duty, and therefore no leader should, without absolute necessity, so interfere; but there may be many occasions, as where a witness turns

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a close, no other counsel on the same side can put a question to the same witness. (m) Formerly, it was the invariable practice for the *same* counsel who had examined a witness in chief for the plaintiff or the defendant, to *re-examine* such witness; but of late it is frequently the practice for the leader to put such questions as he may think fit in reply, especially when, from the conduct of the witness, it may be requisite almost to re-examine him as an adverse witness.

Modes of examining a witness in chief. (n)

1. Questions must be *pertinent* to the issue.

2. Question must not be *too leading*. (o)

There are undoubtedly two principal rules to be observed in examining a witness in chief; viz. first, to ask no *impertinent* or *useless* question; and secondly, not to ask a *leading* question. The first is objectionable as wasting time; but the judge will in general, for a short time, give the counsel credit for a just object connected with the suit, and not interfere till it is obvious the succession of similar questions will not lead to any useful result. With respect to *leading questions*, the *assigned* reason in support of the rule is, that a witness usually has a strong feeling in favour of the party who has subpœnaed him, and is disposed to swear any thing that he thinks will serve that party, and that a leading question in effect suggests to the witness the answer that he is desired to give, and invites misrepresentation. (p) This reason imputes to the counsel an unworthy motive, and to every witness a supposition that he would be guilty of perjury; but perhaps the better and more comprehensive reason is, that many witnesses, either from complaisance or indolence, are too much disposed to assent to the proposition of the counsel, and answer as he may suggest, instead of reflecting, and answering after an exertion of their own memory. (q) And this last reason applies as well to *leading questions* put to an obviously favourable witness, as of one de-

round upon the party who has subpœnaed him, and requires an examination as leading and hostile in effect as a *cross-examination*, and which perhaps only *the leader* can readily obtain *permission of the judge* to adopt, and unless the leader interfere immediately on the spur of the occasion, the cause might be lost. A case of this nature is almost the only instance in which so open a disparagement of a junior should be tolerated, and certainly there is no excuse even in the utmost zeal and anxiety for the client, that can justify the *coarse conceited assumption* of any leader, that he alone can conduct every part of a cause with adequate ability.

(m) *Stante* v. *Prickit*, 1 Campb. 473; *Doe* v. *Roe*, 2 Campb. 280.

(n) See in general 1 Stark. Ev. 2d ed. 149, 150; Peake, Ev. 198; 1 Arch. K.B. 328; 2 Arch. C.P. 146 to 149.

(o) See illustration, *post*, 895, n. (e).

(p) See 1 Stark. Ev. 2d ed. 149, 150; Peake, Ev. 196; 1 Arch. K.B. 328; 1 Arch. C.P. 146 to 149.

(q) Thus, if the leading question were thus, "*Was not it* a cold day," many witnesses would answer "yes," or "rather so," too hastily confounding the state of the weather on one day with that upon another day. And as to complaisance, the instances given by Shakspeare will illustrate, see Hamlet, act iii. scene 2d, and act v. scene 2d, particularly the last, where the courtier Osric complaisantly assents to Hamlet's statement of the change from cold to heat almost in an instant.

cidedly adverse or neutral, or certainly of too high character wilfully to deviate from the truth; so that such form of question should *never* be adopted; nor can the answer to such a question ever be so worthy of credit as an answer to a question so shaped as to *compel* the witness to answer it according to the best of his own *exerted memory*. It is true that it has been laid down, that in *cross-examination* a leading question may be asked; but that position has been much qualified, and, as observed by Buller, J., "you may, in cross-examination, bring the witness "*directly* to the point, but cannot put into his mouth the very "words it is hoped he will echo back."(*q*) However, without regard to the reason upon which the objection to leading questions is founded, it is certain that objections to questions of this nature are of the highest importance; and when a judge or jury observe that in an examination in chief, or in cross-examination, the witness is too prone to favour the party on whose behalf a leading question has been put, he will give but little credit to the testimony thus obtained; but where the matter to which the witness is examined is *merely introductory* of that which is material, it is frequently desirable to lead the mind of the witness directly to the subject, not only by leading questions, but also by an affirmative statement of all the facts immediately preceding that upon which the witness is to be examined, thus bringing to the witness's mind *the subject of inquiry*. (*r*) And it will be proper in the brief concisely to mention the facts or circumstances that will most likely remind the witness of the fact particularly wished to be elicited, so as to enable the counsel to suggest a sufficient question to the witness.

When leading questions may be necessary or proper, or are permitted.

However, objections of this nature ought not to be wantonly or captiously made,(*s*) since it is to some extent always necessary to lead the mind of the witness to the subject of inquiry. In some instances the Court will allow leading questions to be put upon an examination in chief, as where it evidently appears that the witness wishes to conceal the truth, and to favour the opposite party.(*t*) So where from the nature of the case the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it, as where he is called to contradict another as to the contents of a particular letter which is lost, and cannot without suggestion recollect the contents, the particular passage may be suggested to him.(*u*)

(*q*) Per Buller, J. in *Hardy's case*, 24 Howell's State Trials, 755; Phillips, 284; 1 Stark. Ev. 162, q.; *post*, 898, 899.

(*r*) 1 Stark. Ev. 2d ed. 149, 150.

(*s*) *Nicholls* v. *Dowding*, 1 Stark. Rep. 81; 1 Stark. Evid. 2d ed. 150, n. (*i*).

(*t*) 1 Stark. Evid. 151.

(*u*) *Courteen* v. *Torese*, 1 Campb. 43; 1 Stark. Evid. 152.

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So where a witness is called to contradict the testimony of a former witness, who has stated that such and such expressions were used, or such and such things were said, it is the usual practice to ask whether those particular expressions were used or those things were said, without putting the question in a general form, by merely inquiring what was said. (*x*) If this were not to be allowed, it is obvious that much irrelevant and even inadmissible matter would frequently be detailed by the witness. So where a witness is called to prove a copartnership between a number of persons, whose names he cannot recollect, the list of names may be read to him, and he may be asked whether those persons are members of the firm. (*y*) So in order to identify a person whom the witness has already described, the person may be pointed out to him, and he may be asked in direct terms if that be the person he meant. (*z*)

It is certainly the practice, when the time and place of the scene of action have once been fixed, to desire the witness *to give his own account of the matter*, directing him, when not a professional person, to omit as he proceeds any account of what he has only heard from others, and not seen or heard himself, and which he is too apt to suppose is quite as material as that which he himself has seen. If a vulgar ignorant witness be not allowed to tell his story in his own way, he becomes embarrassed and confused, and mixes up distinct branches of his testimony. He always takes it for granted that the Court and jury know as much of the matter as he does himself, because it has been the common topic of conversation in his own neighbourhood, and, therefore, his attention cannot easily be drawn so as to answer particular questions without putting them in the most direct form. It is difficult, therefore, to extract the important parts of his evidence piecemeal, but if his attention be first drawn to the transaction, by asking him when and where it happened, and he be told to describe it from the beginning, he will generally proceed in his own way to detail all the facts in the due order of time. (*a*) In each particular case, however, it is in the discretion of the Court to regulate the mode in which a witness in chief shall be examined, in order best to answer the purpose of justice, and there is no fixed rule which binds counsel to a particular mode of examining him; for if a witness by his

(*x*) 1 Stark. Evid. 2d ed. 152, n. (*m*).

(*y*) *Acerro* v. *Petroni*, 1 Stark. Rep. 00; 1 Stark. Evid. 2d ed. 152; Chitty on Bills, 8th ed. 635, 634.

(*z*) *Rex* v. *Watson*, 2 Stark. Rep. 116.

(*a*) 1 Stark. Evid. 2d ed. 151, n. (*l*).

conduct shows himself decidedly adverse to the counsel who called him, it is in the discretion of the Court to allow a cross-examination. The situation of the witness and the inducements under which he may labour to give an unfair account, are material considerations in this respect. A son will not be very forward in stating the misconduct of his father, of which he has been the only witness, and a servant will not in an action against the master readily admit his own negligence.(*b*) And if a witness called stands in a situation which of necessity makes him adverse to the party calling him, counsel may, *as matter of right*, cross-examine him.(*c*).

Order of proof.

The order of proof is in general in the discretion of the leading counsel, excepting that when once his witness has left

(*b*) *Id.* n. (*k*); see 2 Evans's Pothier, 267.

(*c*) Per Best, C.J., *Clarke* v. *Saffery*, 1 Ry. & Moo. Rep. 126; and see Peake's Evid. 198. Sir Walter Scott, in the second volume of Heart of Mid Lothian, in his interesting description of the trial of the sister of Jeannie Dean for child murder, has thus briefly alluded to the use of *introductory questions* to a witness, and observed upon objections to *leading questions*.

"After the advocate had conceived that by these preliminary and unimportant questions he had familiarized the witness with the situation in which she stood, he asked 'whether she had not remarked her sister's state of health to be altered during the latter part of the term when she had lived with Mrs. Saddletree?' Jeannie answered in the affirmative.

"'And she told you the cause of it, my dear, I suppose?' said Fairbrother, in an easy, and, as one may say, an inductive sort of tone.

"'I am sorry to interrupt my brother,' said the crown counsel, rising, 'but I am, in your lordship's judgment, whether this be not a leading question?'

"'If this point is to be debated,' said the presiding judge, 'the witness must be removed.' For the Scottish lawyers regard with a sacred and scrupulous honour every question so shaped by the counsel examining as to convey to a witness the least intimation of the nature of the answer which is desired from him. *These scruples, though founded on an excellent principle, are sometimes carried to an absurd pitch of nicety*, especially as it is generally easy for a lawyer who has his wits about him to elude the objection. Fairbrother did so in the present case.

"'It is not necessary to waste the time of the court, my lord, since the king's counsel think it worth while to object to the form of my question, I will shape it otherwise.'

"'Pray, young woman, did you ask your sister any question when you observed her looking unwell?—take courage—speak out.'

"'I asked her,' replied Jeannie, 'what ailed her?'

"'Very well—take your own time—and what was the answer she made?' continued Mr. Fairbrother.

"Jeannie was silent, and looked deadly pale. It was not that she at any one instant entertained an idea of the possibility of prevarication—it was the natural hesitation to extinguish the last spark of hope that remained for her sister.

"'Take courage, young woman,' said Fairbrother. 'I asked what your sister said ailed her when you inquired?'

"'Nothing,' said Jeannie, with a faint voice, which was yet heard distinctly in the most distant corner of the court-room, such an awful and profound silence had been preserved during the anxious interval which had interposed betwixt the lawyer's question and the answer of the witness.

"Fairbrother's countenance fell; but with that ready presence of mind which is as useful in civil as in military emergencies, he immediately rallied.

"'Nothing? True; you mean nothing *at first*—but when you asked her again, did she not tell you what ailed her?'

"The question was put in a tone meant to make her comprehend the importance of her answer, had she not already been aware of it. The ice was broken, however, and with less pause than at first she now replied,

"'Alack! alack! she never breathed word to me about it.'

"A deep groan passed through the court," &c. &c.

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the box, he cannot recall him as to any point he had omitted, unless by leave of the judge.(*d*) As it is impossible to prove several facts simultaneously, the arrangement is open to the discretion of counsel, and, therefore, in an action against several defendants the plaintiff is not compellable first to prove a joint liability of all, but may first prove an admission or statement made by one, and afterwards proceed step by step to fix each of the other defendants, and ultimately connect them in joint liability, although it might be more convenient first to prove the joint liability.(*e*) If when an instrument be tendered in evidence it is objected that it is not sufficiently stamped, the judge will sometimes allow the parties to send it to the Stamp-office to be immediately stamped, and allow the party in the meantime to go on with the rest of his evidence; but in that case the judge will not allow the point as to stamp to be argued whilst the instrument is absent.(*f*)

Whether a party can discredit a witness called by him.(*g*)

It is still a disputed point whether a party can be allowed *to discredit his own witness;* as where a plaintiff having examined four witnesses in support of his cause, called a fifth, who had previously stated that he should prove the same, but on the trial quite contradicted them, and the question was, whether the plaintiff's attorney could be permitted to produce and read a paper on which he had on a previous examination of such fifth witness written down his expected evidence, and read it over to him, and which he then stated was correct, and yet on the trial contradicted. Denman, C. J. was of opinion in the affirmative, but Bolland, J. in the negative.(*h*) It seems, however, to be clearly established, that if a witness called by the plaintiff turn out unfavourable, the plaintiff may afterwards call *another witness* to establish the point;(*i*) and upon an issue whether the plaintiff was interested in goods destroyed by fire, if a witness called *by the plaintiff* state that invoices of the goods and letters of advice purporting to be written by him in Edinburgh were fabricated in London after the fire by the plaintiff's direction, it is competent to the plaintiff to *call other witnesses* to disprove the alleged fabrication, and show

(*d*) See *ante*, 855, *post*, 901.

(*e*) *Whitford* v. *Tutam and others*, 6 Car. & Payne, 228.

(*f*) Per Gurney, B., *Beckwith* v. *Benner*, 6 Car. & Payne, 681, 683, *ante*, 688, n. (*s*).

(*g*) 1 Stark. Evid. 2d ed. 185, 186; 1 Arch. K. B. 4th ed. 330, 331.

(*h*) *Wright* v. *Beckett*, 1 Moo. & Rob. 414; but see *Ewer* v. *Ambrose*, 3 Barn. & Cress. 746; see in general 1 Stark. Evid. 185, 2d ed.

(*i*) 1 Stark. Evid. 185; *Alexander* v. *Gibson*, 2 Campb. 556; *Richardson* v. *Allan*, 2 Stark. Rep. 556; *Ewer* v. *Ambrose*, 3 Barn. & Cress. 746.

the genuineness of the documents.(k) And though it has been laid down as a general rule, that a plaintiff or a defendant shall not be allowed to disprove what his own witness has sworn;(l) yet it is admitted that where what the witness swears is *palpably false*, and it would be a great injustice to allow the party's case to be sacrificed, then an exception is to be allowed.(m)

10. Whenever a witness has been called and *sworn*, and *questioned*, and he has *actually given evidence in chief*, on behalf of the plaintiff or the defendant, it follows that the opponent has a *right to cross-examine* him, so as to endeavour to alter the effect of any evidence he has given. And even if a witness were called and sworn, though not examined or asked any questions, it was, nevertheless, held, that the opponent had thereby acquired a right (then inaccurately termed to *cross-examine*) to examine him as if he were an adverse witness, respecting any evidence he could give;(o) and it was formerly held, that if a witness had been called into the box, and inadvertently *sworn*, he might be thus examined by the opponent, although he had not been asked a question by the party who had subpœnaed and called him;(p) and it has been supposed that if a witness called merely to *produce* a document, which when in Court might be proved by any other, yet if he were sworn, though not examined on his oath, the opponent had the right to examine him.(q) But the *present practice is otherwise*, and if a witness be merely served with a subpœna duces tecum, and called in Court to produce the enumerated documents, and which he accordingly produces, and he is not examined to give evidence in chief, the opponent has no right to examine him as in cross-examination.(r) And even if the witness be *asked* a question in chief, yet if he *make no answer* the opponent then also has no right to cross-examine.(s)

19. Of the *cross-examination* of witnesses, and rules respecting the same.(n)

1. Of the *right* to cross-examine.

It has been well observed "that the power and opportunity

(k) *Friedlander* v. *London Assurance Company*, 1 Nev. & Man. 30; 4 Barn. & Adol. 190, S. C.

(l) 5 State Trials, 2, 764, 792.

(m) *Alexander* v. *Gibson*, 2 Camp. 556; 2 Stark. R. 334.

(n) See in general, 1 Stark. Ev. 2d ed. 160.

(o) *Phillips* v. *Eamer*, 1 Esp. R. 357; *Morgan* v. *Brydges*, 2 Stark. Rep. 314; *Rex* v. *Brook*, 2 Stark. 472; 1 Stark. Ev. 161.

(p) *Id. ibid.*; 1 Stark. Ev. 161.

(q) *Simpson* v. *Smith*, 1 Stark. Ev. 2d edit. 179, note (a).

(r) *Ante*, 830; *Lush* v. *Smith*, 1 Cr., M. & Ros. 94; *Summers* v. *Moseley*, id. 96; *Davis* v. *Dale*, 1 Mood. & Malk. 514; 4 Car. & P. 335, S. C.; *Simpson* v. *Smith*, and other cases, 1 Stark. Ev. 161, note (a).

(s) Per Gurney, B., in *Rush* v. *Smith*, 1 Cr., M. & Ros. 95.

to cross-examine a witness called to give *evidence in chief*, either for the plaintiff or the defendant, is one of the *principal tests* which the law has devised for the ascertainment of truth, and is certainly a most efficacious test. By this means the situation of the witness, with respect to the parties and the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discerning facts in the first instance, and his capacity for retaining and describing them, are fully investigated and ascertained, and submitted to the consideration of the jury, who have an opportunity of observing the manner and demeanour of the witness, circumstances which are often of as high importance as the answers themselves. (*t*) It is not easy for a witness, who is subjected to this test, to impose upon the Court; for however artful the fabrication of the falsehood may be, it cannot embrace all the circumstances to which the cross-examination may be extended, the fraud is therefore open to detection for want of consistency between that which has been invented and that which the witness must either represent according to the truth, for want of previous preparation, or misrepresent according to his own immediate invention. In the latter case the imposition must obviously be very liable to detection, so difficult is it to invent extemporaneously, *and with a rapidity equal to that with which a series of questions is proposed in the face of a Court of justice*, and in the hearing of a listening and attentive multitude, a fiction consistent with itself and the other evidence in the cause." (*t*)

As regards the *rapidity* here alluded to, the position seems to import a deviation from the usual slow mode of waiting between each question until the previous answer has been written down by the learned judge; and undoubtedly when a particular part of the examination of a witness is obviously, from the manner of the counsel, pursued, in order to detect falsehood, a judge may feel it essential to permit *a rapid succession* of questions, interspersed with such running comments as may be important in eliciting truth. (*u*) According to the

(*t*) 1 Stark. Ev. 2d edit. 161, cites Bac. Ab. tit. Evidence E; Hobart, 325; Hale, P. C. 253, 259; Preface to Fortescue's Rep. 2 to 4; Vaughan's Rep. 143.

(*u*) It was certainly the practice, when Sir W. Garrow was at the bar and cross-examined a witness in his superior and unparalleled manner, that the judge never stopped *him* in the course of his examination, however rapid, but laid down his pen and waited for the entire result.

practice of the ancient Roman law, the advocates were entitled, in addition to their *general* speeches, to make a *perpetual running comment upon the testimony of the witnesses*, and even upon documentary evidence as it was adduced;(x) and although no such general practice now prevails, yet when *cross-examining* a witness who prevaricates, the counsel, in order to expose his falsehood, will frequently make a *running comment on his testimony*, so as to extract even from him a confession of his falsehood or error.

What disparaging questions may be asked in cross-examination.

A witness may be *asked* a question, the answer to which might subject him to prosecution and punishment, though he is not compellable to *answer* it; (y) but no counsel has a right to interpose to prevent the witness from answering. All other questions for the purpose of *disparaging or impeaching a witness's character* may not only be asked but they *must* be *answered*.(z)

Mode of cross-examination, leading questions, &c.

As regards the *mode of cross-examination*, it is a common doctrine that when a witness has been examined in chief, the counsel of the opponent, whether plaintiff or defendant, may put any question at all relevant to the cause he may think fit, and in a manner *however leading*.(a) But we have attempted to show that the principle on which objections to leading questions is founded is much more extensive, and is not confined to questions to a witness *in chief*, but equally extends to a witness when under cross-examination, unless it appear that the person is not the witness of truth, but evidently *endeavouring to conceal the truth* from the counsel who is examining him, whether for or against the plaintiff, and in which case the most leading questions ought to be permitted.(b) And in practice the position that *leading questions* may be put in cross-examination is now considerably *qualified;* for if the witness betray an anxiety to serve the party against whom he was examined as a witness in chief, a direct leading question will not then be permitted in cross-examination, and Buller, J., observed, "You may lead a "witness upon cross-examination to bring him *directly to the* "*point* as to the answer; but not go the length of *putting into* "*the witness's mouth the very words which he is to echo back* "*again*." (c) Indeed, it is obviously indiscreet in any case to

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(x) 1 Stark. Ev. 365, note (g).

(y) Per Bayley, J., in *Rex* v. *Holding* and another, at the Old Bayley, June, A.D. 1821.

(z) See *The Queen's case*, 2 Brod. & Bing. 311.

(a) *Dickenson* v. *Shee*, 4 Esp. Rep. 68; 1 Arch. K. B. 4th edit. 331.

(b) *Ante*, 892, 893.

(c) Stark. Ev. 162, note (c), in *Hardy's case*, Howell's State Trials, 24; Phillips, 284; *ante*, 893.

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obtain evidence by a leading question, which might possibly be obtained by other means, because the opponent's counsel or the judge will scarcely ever forget to suggest to the jury that evidence so obtained is suspicious, and to be little depended upon. (*d*) In short, leading questions should never be put but when the witness is obviously anxious to conceal the truth.

It is another rule that a witness is not to be cross-examined as to any distinct collateral fact, for the purpose of afterwards impeaching his testimony by contradicting him; (*e*) this is as objectionable as an impertinent question to a witness examined in chief; (*f*) and would render an inquiry, which ought to be confined to the matter in issue, intolerably complicated and prolix, by causing it to branch out into an indefinite number of collateral issues. (*g*) There may, however, be exceptions, as where collateral and immaterial questions may be put, in order to establish that the witness is insane, by his answers to certain questions showing that he is subject to mental delusions.

It seems to have been settled in the Queen's case that questions tending *to disgrace* the witness may be put, (*h*) and that not only a question as to an act done by the witness, the answer to which might criminate him, may be put, in order to afford a foundation for contradicting him, if he deny the fact, but the adverse party could not, without asking the question, adduce such evidence to impeach the credit of the witness. (*i*) If a witness voluntarily answer questions tending to criminate him on his examination in chief, he is bound to answer on cross-examination, however penal the consequence may be. (*k*) If a witness choose to answer a question to which he might have demurred, his answer may afterwards be used in evidence against him for all purposes. (*l*)

There is great risk in cross-examination, for if unfavourable evidence be thereby elicited, it seems to be a rule to take the statement most strongly against the party so cross-examining, and this, although the same evidence, if offered in chief, would not have been admissible. (*m*) And hence, in a case of any difficulty, a prudent junior will be obliged to his

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(*d*) 1 Stark. Ev. 162.

(*e*) 1 Stark. Ev. 2d edit. 164, *ante*; but see *Harris* v. *Tippett*, 2 Campb. 637; *Spenceley* v. *De Willett*, 7 East, 108.

(*f*) *Ante*, 892.

(*g*) 1 Stark. Ev. 164.

(*h*) 1 Stark. Ev. 171, 172.

(*i*) *The Queen's case*, 2 Brod. & Bing. 311.

(*k*) 1 Stark. Ev. 2d edit. 172, cites per Dampier, J., Winchester summer assizes, 1815, Manning's Index, tit. Witness, 222.

(*l*) 1 Stark. Ev. 172; *Wright* v. *Littler*, Burr, 1244; 1 Bla. Rep. 346.

(*m*) See an instance in *Wright* v. *Littler*, Burr, 1244; 1 Bla. Rep. 346; 1 Stark. Ev. 172, note (*i*).

leader to take the cross-examination of all dangerous or uncertain witnesses.

Counsel has no right to mislead a witness.

It is an established rule, as regards cross-examinations, that a counsel has no right, even in order to detect or catch a witness in a falsity, *falsely to assume* or pretend that the witness had previously sworn or stated differently to the fact, or that a matter had been previously proved, when it had not.(*n*) Indeed, if such attempts were tolerated, the English Bar would soon be debased below the most inferior of society.

11. Of the re-examination.(*o*)

11. The counsel who first examined the witness, or indeed according to the modern practice, very frequently the leader, after the cross examination has been closed, has a right to re-examine him, to explain any part of his cross-examination that may have cast any doubt upon his evidence in chief,(*o*) but not upon parts of the witness's evidence in chief, upon which he was not cross-examined; because that would occasion useless repetition and trouble to the judge.(*o*) If, however, any *new fact* arise out of the cross-examination the witness should, on the re-examination, be fully questioned respecting it.

12. Of calling back a witness in chief.(*p*)

12. After the plaintiff's counsel has examined his witness in chief, and the witness has retired from the box, more especially when the plaintiff's case has been closed, his counsel cannot as of right call back such witness to answer another question, which inadvertently he neglected to ask in the first instance, for the order and regularity in the proceedings might be thereby greatly disturbed; but sometimes, as when the justice of the case cannot be prejudiced, the judge will permit a witness to be recalled and further examined;(*q*) and this even in a penal action.(*r*) And a judge may, in the exercise of his discretion, allow additional evidence to be given by either party at a later period of the cause.(*s*)

(*n*) *Hill* v. *Coombe*, 1 Stark. Ev. 2d edit. 162, 163.

(*o*) See in general, 1 Stark. Ev. 179.

(*p*) *Id.* 181.

(*q*) *Alldred* v. *Halliwell*, 1 Stark. Rep. 117; 1 Car. & P. 118; *Giles* v. *Powell*, 2 Car. & P. 259; *Soulby* v. *Pickford*, 2 M. & P. 545; Tidd, 859.

(*r*) 1 Car. & P. 206; Tidd, 9th ed. 859.

(*s*) *Per* Bayley, B., in *Williams* v. *Davies*, 3 Tyr. 384; Crom. & M. 464, S. C.; *Giles* v. *Powell*, 2 Car. & P. 259. *Adams* v. *Bankart*, tried at Leicester summer assizes, 1834, *coram* Taunton, J. After a Mr. Mills had concluded his testimony, defendant's counsel having insisted that plaintiff must be nonsuited, on the ground that plaintiff had not proved a verbal agreement on the part of plaintiff's deceased partners to refer to arbitrators, and in particular the agreement of Mr. Heygate; and plaintiff's counsel having both insisted that their notes of the evidence stated that Heygate had been present repeatedly, Taunton, J. said his notes did not state any such evidence, *and that his notes must be conclusive.* Plaintiff's counsel then requested that Mills, the arbitrator, might be recalled; but Taunton, J. refused, saying he could not allow a witness, after he had seen

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13. Acquittal of one of several defendants at the close of plaintiff's case. (t)

13. The improper practice of joining several persons as defendants, with a view to exclude the evidence of either against the plaintiff, has been materially repressed by the 3 & 4 W. 4, c. 42, entitling an acquitted defendant *to costs* in every description of personal action; but still instances of such improper practice *may* again occur, and in that case the defendant's counsel may forcibly impress the injustice of the attempt upon the jury, so as to prejudice the plaintiff's case. The practice has been thus laid down, viz. that if *no evidence whatever* has been given against the person so improperly made defendant, he may be acquitted immediately the plaintiff has closed his case, and may then be examined as a witness on behalf of the other defendants; but if there be any even the *slightest evidence* to charge one defendant, he cannot be acquitted immediately, so as to enable him to give evidence for the others, but the case must go altogether to the jury; (u) and that the acquittal of one of several defendants is not a matter of right which the defendant's counsel can claim; it being discretionary with the judge at nisi prius whether he will direct the acquittal of the defendants, against whom there is no evidence, at the close of the plaintiff's case, for the purpose of making them witnesses for the co-defendants. (x) But in two late cases upon this question it was stated, that "the new rule with respect to defendants, not fixed by the evidence, is, that the verdict in their favour is to be taken at the end of the plaintiff's case, (y) after which the other defendants are entitled to call the acquitted defendant as a witness in their favour. And Parke, J., said, "It has been settled by the unanimous opinion of the "judges, that if there be *no* evidence against any one defend-"ant, at the conclusion of the case on the part of the plaintiff, "such defendant is to be acquitted; so that all defendants not "fixed by the plaintiff's evidence are to be acquitted before "any part of the defence is gone into. This was the unani-"mous opinion of all the judges; before that, there was a "discrepancy in the practice." (z) Where an action was brought against several defendants, and before the trial it was

where the shoe pinched, to be re-examined, unless the defendant's counsel consented, which they declining, plaintiff was nonsuited. On motion to set aside nonsuit, and for a new trial, Lord Abinger and the other barons declared that it was in the breast of a judge to permit a witness to be re-called; and they granted a new trial only on payment of costs.

(t) See in general, Tidd, 861.

(u) Tidd, 9th ed. 861; Peake Ev. 5th ed. 148, 149; 1 Phil. Ev. 6th ed. 68.

(x) Tidd, 9th ed. 861; and cases there cited.

(y) *Per* Bosanquet, J., in *Russell* v. *Rider*, 6 Car. & P. 418.

(z) *Child* v. *Chamberlain*, 6 Car. & P. 215; 1 Mood. & R. 318, S. C.

agreed with one of them that no evidence should be offered against him, because he would be wanted as a witness for the plaintiff, and he attended the trial for that purpose, and yet the verdict was taken against him with the other defendants, and the plaintiffs afterwards became bankrupts, the Court set aside the verdict, though the plaintiff's assignees resisted the application.(*a*)

14. The speech of the defendant's counsel. 1. What in general.

14. When the plaintiff's counsel have closed the evidence in support of the opening speech, the *leading counsel* for the *Defendant* in his turn is to address the jury. This also necessarily varies according to the circumstances of each case, and the experience and judgment of the counsel. When a full defence is to be made as well by *speech* as by *evidence*, the course of proceeding usually is for the defendant's leader, after a few prefatory remarks on the plaintiff's claim, and the weakness in any evidence adduced in its support, to state *fully the several grounds of defence*, and the evidence in support of it; and then assuming that the defence will at least in part be proved, a comparative view of the two cases and evidence on each side is to be taken, and an impressive argument urged that the latter should preponderate; and then the evidence for the defendant will be given.

2. Consideration when or not the defendant's counsel shall open a defence and call evidence.

But the leading counsel for the defendant is very frequently required to exercise a very nice and difficult discretion in the conduct of the defence, and principally whether he shall *give evidence*, which always entitles the plaintiff's counsel to what is termed the general *reply*, or whether, in order to avoid the effect of such reply upon the judge of jury, he shall decline giving any evidence, and rely only upon his own speech. Sometimes the defendant's counsel undervalues his own case and evidence, and not unfrequently he either overrates the talent of his opponent, and will therefore decline offering evidence, to the mortification of his client, who, if the verdict should be unfavourable, will be apt to insist that if evidence had been given for him he would have obtained the verdict. It is difficult, if not impracticable, to state any absolute universal rule upon this subject.

The practice in cases of this nature.

It is in general considered that if the case of the plaintiff be doubtful in law or fact, and has not been very clearly proved

(*a*) *Bloomfield* v. *Blake*, 2 Dowl. 237.

in evidence, then, unless a *very strong* and new ground of defence, with unquestionable evidence, be stated in the brief, the most prudent course is not to *give any evidence*, but for the defendant's counsel to address the judge and jury with his utmost force upon the weakness of the plaintiff's case *as it already stands* upon his statement, and the evidence in support of it. But if the case, as it already stands, *very manifestly preponderates* in favour of the plaintiff, and must, unless *materially altered by evidence*, be decided in his favour, and the brief for the defendant states evidence that will in all probability *turn the scale in favour of the defendant*, then his counsel should *not shrink* from the consequences of any reply, especially when it may be important to the defendant's character or feelings to clear up any ambiguity, but should fully state and prove his case, anticipating and answering, and showing the insufficiency of the probable reply. (*b*)

In cases of the least doubt, *i.e.* which of the two courses should be pursued, unquestionably that most satisfactory to the client is to have the whole case thoroughly investigated, *and the jury will in general expect it, or conclude that the merits will not bear further investigation, and will find their verdict accordingly.* (*b*) It has been well remarked, that the practice of a defendant's counsel declining to call evidence for fear of giving the reply, is attended with considerable inconvenience, inasmuch as it frequently excludes from the view of the Court and jury, circumstances which might materially assist them in attaining to a correct conclusion in law and fact, (*c*) and hence the jury may fairly draw an unfavourable conclusion against the party, who cannot venture to trust them with the full particulars of his case, and by his line of defence appears to expect an advantage to result from obscurity and want of full disclosure; and although experience has established that some leaders, from their superior talent, have *occasionally* had too much influence with a jury, yet a leader for the defendant ought to refute the supposition that it is in vain to struggle against that influence, but he should, by the ability and energy of his observations, and the judicious selection of really important evidence for the defendant, anticipate that notwithstanding the power of the reply, the judge will, by his impressive observations to the jury, dispel all prejudice, and bring

(*b*) Some years experience and conversation with many special and common jurors in Court, in order to ascertain their *notions* as to the inferences jurors in general draw, has induced me to conclude in favour of the bolder line of defence, in most cases even of reasonable doubt.

(*c*) 1 Starkie on Ev. 2 ed. 365, n. (*h*).

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them back to a cool, dispassionate, and impartial decision upon the points upon which their just verdict ought to turn.

It may be admitted that the counsel for the plaintiff, in anticipating the evidence he expects will be given for the defendant, labours under even greater difficulty than the leader for the plaintiff in stating in anticipation *his* evidence, because he can have no reply explanatory of the evidence after it has been actually given, as the counsel for a plaintiff has; and for that reason, if he resolve to give evidence, he must be *very full and impressive*, always recollecting that he speaks subject to the risk of the plaintiff's counsel commenting on any discrepancy between his statement of the defence and the expected evidence and that afterwards really given. He may, however, by anticipation, avert any unfavourable conclusion, by observing on the known difficulty in ascertaining evidence before a trial, especially where a defendant has with propriety avoided any tutoring of witnesses.

As to taking legal objections.

As regards technical or legal objections contrary to the merits or justice of the case, as they frequently prejudice a jury, they should be taken with great precaution; and yet if not noticed, the client might afterwards, on a motion for a nonsuit or new trial, lose the benefit of the objection. In defending an indictment for perjury, as a learned judge declared that it is *the duty of the defendant's counsel to take all supposed objections*, it may be assumed that at least in such a case the judge will direct the jury that they are not to be prejudiced by that course of defence. (*d*) And as regards a civil action, the defendant's counsel may take upon himself the demerit of technical objections, and take them in the early part of his address and close the same with a reliance upon the merits, though he does not consider himself authorized to lose sight of the legal objections.

In actions for *debts*, when it is possible that the learned judge would otherwise give the plaintiff liberty to issue execution immediately or very shortly after the trial, in pursuance of the authority of stat. 1 W. 4, chap. 7, sect. 2, it may be expedient to open and cursorily prove facts that would probably induce him not so to expedite the execution. (*e*)

3. When no *statement* of new facts in favour of defendant should be made.

If the defendant's counsel has resolved *not to give* any evidence nor to call witnesses, he must then cautiously abstain from stating that *any new facts* exist, or that he can prove so and so; for if he do, although he afterwards abstain from giv-

(*d*) *Rex* v. *Stoveld*, 6 Car. & P. 490.

(*e*) See further, *post*, as to *execution*.

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ing evidence, it is in the discretion of the judge to allow the plaintiff to *reply* on such unsupported statement, lest it might prejudice the jury in their not distinguishing between statement and evidence. (*f*)

Nor will a judge permit the defendant's counsel to make what has been figuratively termed a speech *fishing for the verdict*, as stating that he will go fully into the defence or call witnesses, or intimate a long protracted defence, unless the jury are already prepared to find their verdict against the plaintiff, on the ground that he has not made out any case, and that he, the counsel, is anxious to save time by their shortening the cause and *immediately* finding for the defendant. (*g*)

When affirmative pleas of justification are put on the record with the general issue, the plaintiff's counsel *may*, if he please, not only prove the facts of the declaration, but also may, in the first instance and before the defendant's case is gone into at all, go into any evidence which tends to negative the justification, or he may content himself with proving the trespass under the general issue, and then close his case, leaving the defendant to make out his justification as he can, and afterwards go into evidence in reply as to the justifications. But if the plaintiff's counsel, knowing by the pleas what the defence is to be, close his case and trusts to evidence in reply, he is to be restricted to such evidence as goes exactly to answer the case proved, or attempted to be proved, by the defendant in support of the justification, and he cannot be allowed to go beyond it. (*h*) And it was held that in an action for a libel, when the general issue has been pleaded, and also special pleas of justification, the plaintiff may in the outset give all the evidence he intends to offer to rebut such justification, or he may do so in reply to evidence produced by the defendant, but he is not entitled to give *part* of such evidence in the first instance, and to reserve the *remainder* for reply to the defendant's case. (*i*)

However doubtful a point of law may be in favour of the defendant as to the whole or a part of the plaintiff's claim, or in reduction of damages, it may be useful for his counsel to urge it strenuously, not only because it may induce a verdict for less amount, (*k*) but also because it may probably induce the judge to refuse an immediate execution.

(*f*) *Crerar* v. *Sodo*, 1 Moody & M. 85; 3 Car. & P. 10, S. C.; *Rex* v. *Bignold*, 1 Dowl. & Ry. 59; 4 Dowl. & Ry. 70; and MS.; 1 Stark. Ev. 366.

(*g*) *Moriasty* v. *Brooks*, 6 Car. & P. 684.

(*h*) Per Littledale, J. *Pierpoint* v. *Shapland*, 1 Car. & P. 447.

(*i*) *Brown* v. *Murray*, Ry. & M. 254.

(*k*) As in *Holtum* v. *Lotun*, 6 Car. & P. 726.

15. Of several defendants defending separately, and counsel for each, and several speeches for each.(l)

15. In an action against *several defendants*, unless *they have pleaded separately*, it seems to be an invariable rule that one counsel only can address the jury for all the defendants; though if they have separately retained counsel, one counsel for each defendant may cross-examine every witness. (m) But if the several defendants have appeared separately by different attornies, and also *pleaded separately*, then one counsel for each has a right to address the jury as well as cross-examine witnesses. (n) Formerly it was held that the right to several speeches, or even cross-examinations, only applies when several defendants have *defences different or distinct from each other;* and that if they all rely on the *same ground* of defence, only one counsel can be heard to address the jury, and only one counsel can examine each witness upon the part of the defendants, in the same manner as if they had appeared and defended jointly.(o) And in ejectment when several defendants defended in the *same right*, but by different counsel, it was held that only one counsel could address the jury, though each defendant might adduce separate evidence. (p) And in trover, where two defendants defended by the same attorney, and in the *same interest*, but on the trial one appeared by counsel and the other in person, Tindal, C. J. held, that the counsel only was entitled to address the jury, though both he and the defendant appearing in person might cross-examine the witnesses. (q) But the propriety of these qualifications of the rule may be questionable, because it frequently occurs that although the general ground of defence may be the same—as, for instance, a denial of partnership between the defendants, or joint liability as such—yet one or more of the defendants may suspect collusion between the plaintiff and another defendant,—and the *particular ground* or *mode* of establishing the negative of a partnership may be stronger for one defendant than the others, and it may be indiscreet to communicate such ground and evidence to the attorney for the other defendant; and therefore Parke, B. in *Ridgway* v. *Phillips and others*, (r) appears to have considered that the practice acted upon in the above nisi prius cases was not calculated to further the ends of justice, and that when several

(l) See in general Tidd, 9 ed. 860; 1 Arch. K. B. 4 ed. 327; 1 Arch. C. P. 169.

(m) Per Tindal, C. J. in *Bishop* v. *Bryant*, 6 Car. & P. 485.

(n) *Ridgway* v. *Phillips and another*, 1 Crom. M. & Ros. 415; 3 Dowl. 154, S. C.

(o) *Chippendale* v. *Masson*, 4 Campb. 174; but see *Ridgway* v. *Phillips*, 1 Cromp. M. & Ros. 417.

(p) *Doe* v. *Tindal and others*, 1 Mood. & Mal. 314; 3 Car. & P. 565, S. C.

(q) *Perring* v. *Tucker and another*, 1 Mood. & Mal. 391.

(r) *Ridgway* v. *Phillips*, 1 Crom. M. & Ros. 417; 3 Dowl. 154, S. C.; and see *Rex* v. *Williams*, 3 Stark. Rep. 162.

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defendants have appeared by several attornies, and pleaded separately, *several speeches* and cross-examinations for each ought to be allowed.

In *ejectment*, although a landlord and tenant defended by different attornies, and had different counsel, yet, as it appeared that the tenant claimed no title but what he derived from the landlord, the judge on the trial refused to allow more than *one counsel* to address the jury for the defence, though the party's counsel who did not address the jury was permitted to cross-examine and also to call witnesses; but the practice in that case is now questionable. (*s*)

Of the evidence for the defendants, and plaintiff's cross-examination thereof.

With respect to *evidence* on the behalf of a defendant or defendants, the rules respecting it have been anticipated. If the affirmative of *all* the issues be on the defendant, then we have seen that his leading counsel is to begin; (*t*) and he is first to exhaust all the evidence in support of *his* case, and which will then be considered evidence *in chief*, and subject to the same rules as to the modes of examination as when the plaintiff begins, and as we have already considered; (*u*) and the plaintiff's counsel has then the right to cross-examine the defendant's witnesses, subject to the rules before mentioned, which we need not here repeat. (*x*)

16. Of examining witnesses in direct contradiction of the evidence of previous witnesses.

16. We have seen that leading questions are objectionable not only in examinations in chief, but even in cross-examinations. (*y*) In some cases, however, they are permitted as almost indispensable, as where a witness in chief has sworn to a certain fact or to a certain conversation, and another is called for the purpose of contradicting him; and when it is clearly established in practice that the latter witness may be asked directly whether that fact or such conversation ever took place, stating to him the very words previously sworn. (*z*) Indeed when a witness has sworn positively to a fact or conversation when giving evidence in chief, it is usual for the opponent's counsel to take a note of the precise words he uses, and in cross-examination to intimate to him that there are others who will prove the contrary,—and then to ask him, whether he will venture to repeat the same story,—then reading to him the

(*s*) *Doe* v. *Tindale and another*, 1 Mood. & Mal. 314; 3 Car. & P. 565, S. C. But note, that case was decided before *Ridgway* v. *Phillips and others*, 1 Mood. & Mal. 417; 3 Dowl. 154, S. C.; *ante*, 907, note (*r*).

(*t*) *Ante*, 872 to 876.

(*u*) *Ante*, 890.

(*x*) *Ante*, 897.

(*y*) *Ante*, 892 to 896, 890.

(*z*) *Courteen* v. *Touse*, 1 Campb. R. 43.

very words he had sworn,—and afterwards in due order to call the witness to contradict him, and to bring the latter *directly* to the same occurrence or conversation, and ask him, in the *very words* of the previous witness, whether such a fact or conversation occurred; and yet jurors have declared, that unless some other evidence has been given to discredit the witness in chief, they attach more weight to a contradiction elicited by a less leading mode of examining the witness.

17. Of the plaintiff's counsel giving evidence in reply, and of the cross-examinations, speeches, and proceedings thereon.

17. In all cases, after the speech and evidence of the defendant's counsel, and before a plaintiff's counsel replies, he may produce evidence to disprove any part of the defence set up by the defendant, but not evidence merely to strengthen or confirm the plaintiff's original case. On such fresh evidence on the part of the plaintiff the defendant's counsel has a right again to address the jury, but his observations must be confined to the evidence thus last given by the plaintiff, and the reply of the plaintiff's counsel is then to close the case.

Where the defendant's counsel after his speech gives evidence not only to impeach the plaintiff's case but also in support of an entire new case, in defence the plaintiff is of right entitled to controvert the latter by evidence; after which the defendant's counsel may make observations on the last-mentioned evidence of the plaintiff, but in so doing he must confine himself to the same, and cannot comment on the original case or evidence of the plaintiff, because he has already observed upon the same, or had the opportunity in proper time of so doing. In such a case the plaintiff has the general reply. (c)

18. Of the Reply of plaintiff's counsel. (d)

18. In considering which party is to *begin*, we necessarily anticipated many of the rules relative to the reply. In ordinary cases, where the *plaintiff* begins, if the defendant do not adduce any evidence, nor open any facts as capable of proof, the plaintiff in a civil action is not entitled to any reply, though he is entitled to comment upon any *legal authority* quoted by the defendant's counsel in his speech. (e) But if the defendant's counsel *adduce any evidence*, then the plaintiff's counsel is entitled as of *right* to the reply; as if the defendant prove a payment disputed by the pleadings even by producing the particulars of the plaintiff's demand; (*f*) and even if the defendant's counsel state

(a) *Rex* v. *Hilditch*, 5 Car. & P. 299.
(b) 1 Arch. K. B. 332, 333.
(c) Stark. Ev. 384; *Meagoe* v. *Simmons*, 3 Car. & P. 76.
(d) See in general Tidd, 9 ed. 858; 1 Arch. K. B. 4 ed. 332.
(e) *Fairlie* v. *Denton*, 3 Car. & P. 103.
(*f*) *Rymer* v. *Cook*, 1 Mood. & Mal. 86.

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that he shall prove certain facts, and do not afterwards call evidence to prove the same, or if he open facts but call no evidence, though a reply is not in practice a *strict right*, yet the judge may in his discretion permit the plaintiff's counsel to reply, lest any prejudice should remain upon the jury in consequence of the counsel's statement. (*g*) But the defendant's counsel merely reading and commenting upon parts of a book already in evidence will not entitle the plaintiff to a reply. (*h*) Sometimes a defendant's counsel will avoid this consequence of a direct statement and the risk of reply by merely *suggesting* to the jury the *probability* of a *supposed state of facts having existed prejudicial to the plaintiff*, and showing why the defendant may nevertheless be unable to prove the same, but which the jury may suppose and give equal effect to.

Before the plaintiff's counsel replies, he may produce evidence to disprove any part of the defence set up by the defendant, but it must be *new* evidence, not merely confirmatory of the original case; (*i*) and on such fresh evidence the defendant's counsel is entitled to comment, but his observations must be strictly confined to the same, excepting as regards the application of such new evidence to the previous evidence; and finally the plaintiff's counsel is to *reply* on the whole case. (*k*)

If the defendant's counsel, in consequence of all the affirmative issues being on him, has begun, (except in cases of injuries to *the person*,) then, if the plaintiff afterwards calls evidence in answer to the defendant's case, the defendant's counsel is entitled to the general reply. (*l*)

Of Voluntary Nonsuits.

If the plaintiff's counsel, after hearing the arguments and evidence on both sides, perceives that the judge and jury are decidedly against the plaintiff, or he apprehends that, owing to the absence of material evidence, it is probable that he will be able, on a future occasion, to establish a better case, he usually, at this stage, *elects to be nonsuited*; but if the case be not capable of improvement, and there is any chance of obtaining a verdict for the plaintiff or the withdrawing of a juror, (so that each party may pay his own costs), he does not interfere. A nonsuit must always be *voluntary*, *i. e.* by the plaintiff's counsel submitting to the same or not ap-

(*g*) *Rex* v. *Bignold*, 4 Dowl. & R. 70; *Crerar* v. *Sodo*, 1 Mood. & Mal. 85; 3 Car. & P. 10. So in criminal cases, unless the defendant defend in person, see *Rex* v. *Bignold*, 4 Dowl. & Ryl. 70.

(*h*) *Pullen* v. *White*, 3 Car. & P. 434.

(*i*) *Rex* v. *Hilditch*, 5 Car. & P. 299.

(*k*) *Id. ibid.*; 1 Arch. K. B. 333.

(*l*) Tidd, 9 ed. 859.

pearing, and in no case can it be adverse or without implied consent. (*m*)

19. Of the judge's summing up, and other incidental proceedings.

19. The learned Judge then proceeds to *sum up* (as it is termed) to the jury, and which the leading counsel in particular is attentively to observe, as it may be necessary, whilst the judge proceeds, or at least at the conclusion of his summing up, to call his attention to any *material omission* or *misstatement* of *facts* or *law* that might mislead the jury and prejudice the client, and so as to afford the judge an opportunity of correcting his remarks before the jury have been directed to consider their verdict. The junior counsel and attornies on each side are equally bound to observe the summing up; and if either perceive any defect, he should immediately communicate the same to the leader; for all objections should be made through him.

Outline of a summing up.

In summing up, the learned judge concisely states the precise issues joined between the parties, and the affirmative or negative of which the jury must now, since the recent rules, *expressly* find by their verdict (though by the directions of the judge, on the trial of a *feigned issue*, or in case of a *variance* on the trial of any issue, under the 3 & 4 W. 4, c. 42, s. 24, the jury *may find the facts according to the evidence*, and without regard to the terms of the pleadings or issue.) The judge then states the *substance* of the plaintiff's claim and of the defendant's grounds of *defence*. He then, from his notes, (sometimes reading them *verbatim*) states the *evidence* adduced for each party, pointing out as he proceeds to which material question or issue this or that particular part of the evidence may apply, and commenting occasionally on the nature of the evidence and circumstances which attach credit to it. If any question of law be, as is frequently the case, *mixed up* with, or applicable to, questions of fact, he states *the rule of law according to which the jury ought to decide*, and informs them that *they* are particularly to decide upon the *credibility* of the evidence and witnesses, though he will probably observe upon the manner and conduct of each, so as to *assist*, if not in a degree *influence* the jury in their decision upon credibility. (*n*) When he states positions of *law*, he speaks *authoritatively*, and as the jury are *bound* to decide. When he observes on *credibility*, he is merely an unbiased adviser of superior knowledge and experience, and consequently his observations and reasoning on credibility and other subjects are entitled to the greatest weight.

(*m*) *Dewar* v. *Purday*, 4 Nev. & Man. 633.

(*n*) 3 Bla. Com. 375; 1 Stark. Ev. 472.

In an *action* for a libel, he will inform the jury that they are only to consider whether the publication and the innuendoes have been proved, and are not to decide whether or not the matter be libellous, that being matter of *law*, on which the *judge* is to decide, and that he is of opinion that the publication is, in point of law, libellous, and that malice must be *inferred*, and that they are bound to find for the plaintiff accordingly, if they are of opinion that the defendant published the libel, and in the sense imputed in the declaration. (*o*) So in an action for a malicious prosecution, the judge is to state to the jury his opinion in point of *law*, whether or not there was *probable cause* for the previous proceeding complained of, after which (as the question of probable cause is a mixed proposition of law and fact) the *jury* are to find their verdict upon the whole matter, nevertheless giving full weight to the judge's observations upon the *law*. (*p*)

When there are several distinct issues, or it may be material to have *separate findings* on different parts of the case, as *some* damages upon one count for a libel, and *other* damages on another count, the learned judge may direct the jury accordingly; and as to the form of their finding in the affirmative or negative on different parts of the record. (*q*) So if in an action of trespass for false imprisonment, occasioned by the charge of the defendant, and partly occurring before the plaintiff was taken before a magistrate, and partly afterwards, if it be insisted by the defendant's counsel that he is not liable in that form of action to pay any damages for the imprisonment under the directions of the magistrate, the judge will direct the jury to find their damages, if any, separately in respect of each part of the imprisonment; so that the question of legal liability for the *subsequent* imprisonment may be reserved and discussed in the Court above, without disturbing the verdict for damages in respect of the *previous* trespasses. (*r*) When the case is short, the question simple, and the evidence concise, the judge will sometimes consider any summing up unnecessary, or at least he will not read his notes, but merely state the *effect* of the evidence. (*s*)

(*o*) See *Levy* v. *Milne*, 4 Bing. 195; 12 Moore, 418, S. C., and *ante*, vol. i. 45, 46.

(*p*) *Venafra* v. *Johnson*, 6 Car. & P. 53; *Mitchel* v. *Jenkins*, 5 Bar. & Adol. 588; qualifying *Taylor* v. *Williams*, 2 Bar. & Adol. 845, 857, *ante*, vol. i. 50, note (*f*).

(*q*) 1 Arch. K. B. 4 ed. 333, 334; and see *Desbrow* v. *Weatherley*, 6 Car. & P. 761.

(*r*) *Holtam* v. *Lotun*, 6 Car. & P. 726; and see *Desbrow* v. *Weatherley*, 6 Car. & P. 761.

(*s*) 1 Arch. K. B. 4 ed. 333, 334; and see *Desbrow* v. *Weatherley*, 6 Car. & P. 761; and see the summing up of Tindal, Ch. J. in *Desbrow* v. *Weatherley*, 6 Car. & P. 760.

It is the practice for the judge at nisi prius not only to state to the jury all the evidence that has been given, but to comment on its bearing and weight, and to state the legal rules upon the subject and their application to the particular case, and even *to advise them as regards the verdict they should give*, so that it may accord with his view of *the law and justice*; so that in effect, in general, the jury only give their opinion on the *existence of facts*, and even then, in general, they follow the advice of the judge, and therefore, in substance, the verdict is found or anticipated by the *judge's direction*, except, indeed, as regards the *amount of damages*, and which also are greatly influenced by the observations of the judge, or may be corrected, if excessive or too small, by the Court in Banc. Indeed, without this assistance from the learned judge, few juries would, in a contested cause, be able to come to an unanimous opinion, being frequently left in a state of great perplexity by the influence of the speeches of the contending leaders. The accuracy of the summing up of the judge is therefore of the very utmost importance, because if the jury, after hearing the evidence and the powerful arguments which probably have been urged in favour of quite opposite views of the question, were entirely left to decide for themselves, without impartial direction, what just and legal weight ought to be attached to this or to that view of the case, it would be difficult, if not impracticable, for them to come to a *just conclusion*; and hence, in the administration of civil justice, it is incumbent on the judge correctly to state *the law* upon the case, as well as *the evidence*, and the *bearings of the latter*; and he may and ought to direct the jury that they should find a named verdict, if *they believe* the testimony adduced for one of the parties, either generally, or the evidence on a particular point. (*t*)

Directions to a jury respecting costs.

In actions of trespass and on the case for torts, when the jury think the case trifling, and that the plaintiff is entitled to but *small damages*, they will very frequently ask the judge what amount of damages will carry or entitle the plaintiff to his *full costs*. Here the practice has varied. *Some judges* will immediately inform the jury what will be the consequences of their verdict as regards costs, as that the plaintiff will be entitled to no more costs than damages, unless they find a verdict for at least forty shillings damages, or that if they find less than that sum, then he has power to certify, so as to deprive the plaintiff of costs. But other judges consider that

(*t*) 1 Starkie on Evidence, 472.

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the jury ought to find their verdict *for such damages* as they really think the plaintiff has sustained, and wholly without regard to collateral consequences, which ought not to affect their verdict. In a recent action for false imprisonment, where the defendant had pleaded not guilty and a licence, and the jury inquired of the learned judge what was the *largest* amount of damages they could give without entitling the plaintiff to costs, Alderson, B., said, he doubted whether he ought to inform them, as it was rather a matter of law. But he afterwards added, "the smallest damages will carry costs, unless I do something," whereupon the jury found a verdict for 40*s*.(*u*)

20. When and how to object to the judge's summing up.

20. Perhaps for practical purposes it may be here advisable to consider *when and how objections to the judge's summing up* should be taken, and when an imperfection may be the ground of any and what application for relief. As a general rule, objections to the summing up should be taken in the *first instance*, and *immediately* the objection occurs, or, at all events, *before* the judge has closed his observations, and before the jury have retired. The most prudent course is for the leader to interpose before the judge has *stated the whole* of his unfavourable view to the jury, and so as to afford him an opportunity of *altering* his misstatement of facts, or *qualifying* his observations on matters of law, rather than afterwards *contradicting* them; and the high station of the judge demands that the observations (*in effect a correction*) should not have that appearance in Court.(*x*) If the judge *incorrectly reject* a competent witness, or *admit* the evidence of one that is incompetent, or misstate the *law*, or *misdirect* the jury in any respect, so that the client might be prejudiced, it is the *duty* of the leading counsel *immediately to state the objection*, and if he do

(*u*) *Peters* v. *Stanway*, 6 Car. & P. 740, 741.

(*x*) Thus, suppose that in summing up in an action for not taking or paying the price of potatoes, or other crop of annuals, sold whilst in the ground, the learned judge should observe to the jury, that unless they think, upon the whole of the evidence, that there has been a *written contract for the purchase signed by the defendant*, they will, under the statute against frauds, be bound to find for the defendant; the plaintiff's counsel should *immediately* respectfully, and as if apologizing for his own omission in his opening address, in not alluding to the recent decisions, which qualify the previous law, and establish that a *growing crop of potatoes*, turnips, &c. is not regarded as a contract for the sale of an *interest in land*, within the 29 Car. 2, c. 3, s. 4, but rather a contract for the sale of goods, which might have been affected by the 17th section, but which will not affect the present case, because it has been proved, that *earnest* was paid to bind the bargain. This interruption would render it essential for the judge to correct his observation to the jury, or would be ground for tendering a bill of exceptions, or, as more usual, of a motion for a new trial.

not, the Court will not, on motion, grant a new trial; (y) and, therefore, however painful the duty, and in some cases heretofore perhaps dangerous (as regards the subsequent observations of the judge on the merits), yet it is imperative on counsel, if at all, *to object at the time*, or lose the effect of the objection, and be precluded from supporting a motion for a new trial. (y) At the same time it suffices merely *to suggest* the objection to the judge, and to present the point very concisely, supported by the last or best legal authority, and *without pertinaciously pressing it;* for even if the counsel should afterwards *tacitly submit*, without *expressly concurring* in the present opinion of the judge, he will not thereby be precluded from moving for a new trial; for otherwise the useless struggle against the opinion of the judge would not only waste time, but occasionally lead to unpleasant and unbecoming controversy, always to be avoided at nisi prius, where it is the interest of all to maintain the dignity and importance of the Judge. (z) The usual course with that excellent and prudent judge, the late Lord Tenterden, was, if the point were in his opinion *debateable*, or in the least doubtful, though contrary to *his* opinion, immediately it was suggested to give the counsel leave to move either for a nonsuit, or to enter the verdict, and if the point appeared very important, and fit to be more formally decided, he would then suggest a *special case*, and sometimes even with liberty to turn the case, when of sufficient value and importance to justify the expense, into a *special verdict*, or he would suggest the tendering *a bill of exceptions*, (a) so as to enable either party to take the opinion of a *Court of Error;* so that no time was ever lost in arguments on the trial.

The requisites of a correct summing up, and the sustainable objections to the same, have in the principal work on practice by Mr. Tidd been collected and arranged under the head of motions for new trials, and been thus stated. One of the

(y) Per Buller, J., in *Appleton* v. *Sweetapple*, 3 Douglas's Rep. 137 — 141; 1 Taunt. 10; *Robinson* v. *Cook*, 6 Taunt. 336; 1 Stark. Ev. 469; 3 Taunt. 229; 9 Price, 291; *Ritchie* v. *Bousfield*, 7 Taunt. 309.

(z) See *Alexander* v. *Barker*, 2 Tyr. 140; 2 Cromp. & J. 133, S. C.; but see *Elworthy* v. *Bird*, 13 Price, 222.

(a) See the observations of Eyre, C. J., on this *admirable constitutional remedy*, in *Gibson* v. *Hunter*, 2 Hen. Bla. 187; and Chitt. Col. Stat. tit. Bills of Exceptions, p. 117 (a); and one of the latest instances of the utility of a bill of exceptions, in *Bulkeley* v. *Butler*, 2 Barn. & Cress. 434. Unquestionably, if it should occur again, as in former times, that an arbitrary judge, having overwhelming influence in his own Court, should try a cause, and against law reject or admit evidence, or misdirect the jury upon matter of law, and refuse to submit to any other investigation, the only *safe course* would be to tender a bill of exceptions, or demur to improper evidence, so as to secure due examination of the matter in a superior Court of Error. In *Appleton* v. *Sweetapple*, 3 Dougl. Rep. 137, it was considered the *duty* of counsel to adopt that remedy.

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principal grounds of motion for a *new* trial is the *misdirection* of the judge,(b) or his admitting or refusing evidence contrary to law.(c) But it is not a misdirection, if the judge refer the jury to their own knowledge of any particular facts which have been proved as matter of *illustration* only, and not as matter of *evidence*;(d) and the expressions of a judge at nisi prius are not to be measured with exactness, and a judge's direction is not to be objected to on account of particular expressions, if it be such as on the whole and in substance would lead to a just conclusion.(e) So, the Courts will not set aside a verdict on account of the admission of evidence, which ought not to have been received, provided there be sufficient without it to authorize the finding of the jury;(f) nor is it any ground for granting a new trial, that a witness called to prove a certain fact, was rejected on a supposed ground of incompetency, when another witness, who was called, established the same fact, which was not disputed by the other side, and the defence proceeded upon a collateral point on which the verdict turned;(g) and for the same reason, viz. that the misdirection has not really been prejudicial, the Court will not grant a new trial on account of a misdirection, unless it appear that the jury acted upon the same.(h) So, the Courts will set aside a nonsuit, on the ground that the case ought to have been submitted to the jury, unless that was desired on the part of the plaintiff at the trial of the cause.(i) And if, upon the judge's directing the jury to give nominal damages, the plaintiff elect to be nonsuited, the Court of Common Pleas will not set aside the nonsuit and grant a new trial, on the ground of the misdirection of the judge;(k) and we have seen, that if a junior counsel at nisi prius take a well founded objection, which his leader gives up, that Court will not entertain it in discussing a rule for a new trial, or nonsuit on another ground.(l)

21. Of the jury *Withdrawing* to deliberate on their verdict.

21. The judge having completed his summing up, the jury are then directed by the officer of the Court to "consider of their verdict." They have a right, if they desire, *to withdraw* from the bar, *i. e.* jury-box, to a private room, there to deli-

(b) Tidd, 907, and cases there cited.
(c) *Denham* v. *Stevenson*, 6 Mod. 242.
(d) *Rex* v. *Sutton*, 4 Maule & S. 532; and see *Carstairs* v. *Stein*, *id.* 192; 1 Man. & Ryl. 198.
(e) *Gascoyne* v. *Smith*, 1 M'Clel. & Y. 338.
(f) *Horford* v. *Wilton*, 1 Taunt. 12.
(g) *Edwards* v. *Evans*, 3 East, 451.
(h) *Twigg* v. *Potts*, 1 Crom., M. & R. 89.
(i) *Kindred* v. *Bagg*, 1 Taunt. 10; and see *Robinson* v. *Cook*, 6 Taunt. 336; Tidd, 860.
(k) *Butler* v. *Dorant*, 3 Taunt. 229; and see 9 Price, 291.
(l) *Ante*, 878, 879; *Winter* v. *Muir*, 3 Taunt. 531; and see *Pickering* v. *Dowson*, 4 Taunt. 779; Tidd, 860, 908.

berate on their verdict, but they cannot take with them any *documents*, although they have been proved and read in evidence, without leave of the judge, and in some cases of both parties; (*m*) and where in a penal action the jury retired, and took with them the act of parliament, under which the penalty sued for was supposed to have been forfeited, the Court granted a new trial, although the verdict had been for the defendant, upon the ground that probably the jury had improperly assumed to construe the act, and had thereby come to a wrong conclusion, whereas they ought to have taken the law only from the summing up of the judge, and that the judge's permitting the jury to take the act with them was in effect equivalent to a *misdirection*. (*n*)

22. Of Discharging the jury.

22. If the jury cannot, after having retired from the Court for a considerable time, (as for an entire night,) agree upon their verdict, the judge has a right to discharge them rather than suffer them, by undergoing great prostration of strength and longer privation of food, to endanger their health. (*o*) The effect of such discharge is, that neither party pays costs, or rather each bears his own, (*p*) and that the plaintiff may bring a fresh action; (*q*) but although he succeed in such second action, he is not entitled to the costs of the first. (*q*)

The judge may in an undefended cause, even after some evidence has been given, discharge the jury, and allow the plaintiff to withdraw his record, if it appear that the plaintiff cannot proceed further from want of complete proof. (*r*) So if it be discovered that there is no proper issue, as a plea of non assumpsit to a declaration in trover, the judge may discharge the jury, unless both parties will consent to an immediate amendment. (*s*)

23. Of Withdrawing a juror.

23. Another mode of releasing the jury, when after a considerable time has elapsed they cannot agree upon their verdict, is for the counsel of the respective parties to agree to *withdraw a juror*, i.e. to require one of the twelve to leave the jury box, by which means the proceedings on the trial are in effect determined without any verdict or other proceeding.

(*m*) Tidd, 867.

(*n*) *Gregory* v. *Tuffs*, 2 Dowl. 711.

(*o*) A judge may also discharge the jury in a *criminal* case, as where a material witness, as a surgeon, is absent, *Rex* v. *Stokes*, 6 Car. & Payne, 151.

(*p*) *Vallance* v. *Evans*, 3 Tyr. 865; *Sealy* v. *Powis*, 3 Dowl. 372; 1 Harr. & Wol. 118.

(*q*) *Sealy* v. *Powis*, 3 Dowl. 372; 1 Har. & Wol. 118; *Everett* v. *Youells*, 3 Barn. & Adol. 349.

(*r*) *Bonsor* v. *Clement*, 6 Car. & Payne, 230.

(*s*) *Bent* v. *Benyon*, 6 Car. & Payne, 217.

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This arrangement usually takes place at the recommendation of the judge at any time pending the action, when the action is doubtful, or it is on any ground unfit that it should proceed further. In this case each party pays his own costs,(t) and a defendant, by consenting to withdraw a juror, waives any supposed right he may have to claim his costs from the attorney for the plaintiff, on the ground of the action having been brought without the consent of the latter.(u) However, although it is in general understood and expected that there are not to be any further proceedings, yet in point of law the plaintiff may commence a fresh action;(x) and, therefore, a defendant's counsel should require a written engagement, signed by the plaintiff or his attorney, in consideration of the defendant's consenting to withdraw a juror, that the plaintiff will not institute any further proceedings in relation to the subject-matter of that suit.

28. The Verdict.

24. *The Verdict.*—Each juror is sworn to "well and truly try the issue (or issues) joined between the parties, and a true verdict give according to the evidence. So help him God."

By what consideration to be governed.

The term *issue* here imports the *question* or affirmative and negative between the parties, as it appears on the face of the pleadings on the record;(y) and the term *evidence* means the proofs adduced to the jury in *Court*, and precludes them from taking into consideration any knowledge, and still more hearsay information, acquired by any juror out of Court, and upon which it would be a violation of his oath to act. (z)

As regards the *issue* it will be observed, that when the pleadings conclude in an affirmative and negative upon a *single* fact, the jury are by their oath confined to the finding of that particular fact, and cannot assume to inquire into facts admitted by the pleadings on the record;(a) but when the declaration contains many allegations and the general issue is allowed, as in actions of ejectment and in actions against justices and numerous public officers, who are allowed to plead the general issue, and give the special matter in evidence, then numerous facts are referred to the jury. But the excellent recent pleading rules have introduced material improvements in this

(t) *Stodhart* v. *Johnson*, 3 T. R. 657.

(u) *Hammond* v *Thorpe*, 2 Dowl. 721, 1 Crom. Mee. & Ros 64, S. C.

(x) *Sanderson* v. *Nestor*, R. & M. 402, *Everett* v. *Youells*, 3 Barn. & Adol. 349.

(y) See further 1 Stark. Evid. 477, 2d ed.

(z) 3 Bla. Com. 374; 1 Stark. Evid. 13, 14, 477; Trials per Pais, 209, 279; 1 Vent. 67 , And. 321, 1 Salk. 405; 4 Maule & Sel. 53. The ancient policy of our ancestors was however otherwise, and before the statute of Anne and 6 G. 4, there must have been hundredors on the jury.

(a) 1 Stark. Evid. 477.

respect, by either abolishing the general issue or limiting its operations. Thus in an action on a bill or note non assumpsit cannot be pleaded, and in other actions most defences *must* be pleaded specially, and in case, trover, and trespass, not guilty only puts in issue the *wrongful* act, conversion or trespass, and other matters must be pleaded; (*b*) and when a party sues or is sued in a *particular character*, unless it be particularly traversed, it is in effect admitted. (*c*) These rules greatly *limit the power of the jury;* and a counsel, who finds that the terms of the particular issue, coupled with the proof, are in his favour, should take care and remind the jury that by their oath they are limited to this or that particular inquiry, stating it, and are bound to find expressly in the language of the issue. Of course, in order to create a feeling towards his client, all parts of the case will be represented to the jury in the most favourable view, but in many cases the strongest ground to rely upon will be the *precise terms of the issue.* Whilst the *abuse* of the plea of non assumpsit or other general issue was permitted, the jury, according to their general view of the *whole* of the plaintiff's or the defendant's case, or even their unjust *prejudice,* used frequently to find their verdict for the plaintiff or the defendant generally, without assigning, or, perhaps, being able to assign, one adequate reason or ground, or stating on what particular point they found. But now when issues are so much more precise, and limited to the existence of one particular fact, a different result must be experienced; and if the jury should find a perverse verdict, contrary to the evidence and the judge's direction, their misconduct can be more readily detected and remedied on a motion for a new trial. (*d*)

Damages.

It will be observed, that with respect to *damages* the oath of the jurors is silent, unless in cases where the defendant has suffered judgment by default as to a part, or one of several defendants in an action for a tort has suffered judgment by de-

(*b*) *Ante,* 723 to 729.

(*c*) *Ante,* 723.

(*d*) Thus, suppose an action on a bill of exchange, and the defendant has pleaded that he accepted the bill without consideration, and that it was obtained from him by the drawer *and the plaintiff* by fraud and covin, and the replication traverse that the bill was obtained by the drawer *and the plaintiff* by fraud and covin, upon which the *issue* has been joined; and suppose that the proof only establishes that the *drawer* was guilty of the fraud and covin, but *the plaintiff* cannot be implicated in the original fraud by the evidence, and yet it is proved that the plaintiff obtained the bill from the drawer *after the bill was due,* and which, if it had been so pleaded, would have been a sufficient defence. Here, however inclined the jury may be to find for the defendant according to the real justice of the case, yet they cannot do so, they being bound by the terms of the issue, which the defendant unfortunately has not proved.

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fault, in which case the jury are sworn to assess the *damages*. In all cases, however, the jury are by the common law bound not only to find their verdict upon the issues, but to find *some* damages, except in a penal action, in which a common informer is not entitled to damages. As regards *damages*, although in actions for torts, the *amount* is much in the discretion of the jury, yet in actions on contracts it is otherwise; and if there were a contract to pay a sum certain, that *must* be considered *stipulated* damages, they must give their verdict for that sum,(*e*) unless in the case of catching bargains, when it would seem the jury may give a smaller sum; (*f*) and in an action on a covenant in a lease to pay £50 per acre as increased rent for ploughing up pasture land, the jury on the first trial having found a verdict for the real damages, the Court, on motion for a new trial, held that the jury had no discretion on the subject, but were bound by their oath to find for the full increased rent; and afterwards Lord Tenterden on the new trial again so directed the jury, and who then found accordingly. (*g*)

As to a verdict for *Interest*.

As regards a verdict for *interest*, the statute 3 & 4 W. 4, c. 42, sect. 28, introduced most important improvements in the law, by enabling a creditor for *a money demand* in most cases to recover *interest*, at 5 per cent., if payable at a time certain, under a written contract from that time, and if not so secured, then from the time of *written demand* of interest, thus taking away the too prevalent inducement to withhold payment, previously existing. We have in a previous page shown the consequent expediency in the latter case for an early service of a written notice demanding interest; (*h*) and we have seen that the 29th section enables a jury to give damages in the nature of interest beyond the value of the goods, from the time of the conversion or seizure, in all actions of trover or trespass, de bonis asportatis, and in actions on policies of insurance. (*h*)

Whether jury may state or be asked their

In practice the jury are not allowed to explain their reasons, nor are counsel suffered to ask for an explanation as to the grounds of their verdict; and where in a penal action the jury found for the defendant and wished to give their *reasons* for their verdict, the learned judge said, "I have left certain questions to you and have made such observations as I felt it my duty to make upon those questions, you have no doubt maturely considered the questions and also my observations

(*e*) *Ante*, vol. i. 872.

(*f*) *Ante*, vol. i. 112, n. (*n*), 458, 826, 838, 839.

(*g*) *Farrant* v. *Olmius*, 3 Barn. & Ald. 692; 3 Young & Jer. 298, S. C.

(*h*) *Ante*, vol. i. 498, where see the enactments.

"respecting them, and have drawn your own conclusions, and "you having done so, I think that *I ought not to hear the "grounds on which you have found your verdict.*" (*i*)

Question whether the counsel for either party has not now at least a right to know what precise issue the jury find.

In that particular case of a finding for the *defendant* in a *penal action*, it accorded with general principles not to give facility to any inquiry which might subject the defendant in such an action to the risk of a different verdict; but in *ordinary cases*, not partaking of a criminal or penal nature, it might be desirable that full inquiry should be given into the circumstances under which a jury may have found their verdict, especially when *they express a desire* to explain, as in the case referred to, and in numerous other cases that almost daily occur, or in cases where they are manifestly under some misapprehension. The refusal of inquiry seems to insinuate that in legal supposition it is merely sufficient to have *a verdict* without regard to its correctness, (*k*) whereas in all other stages of an action each proceeding even of the judges is subject to investigation, and if erroneous may be inquired into and rectified; and it is a principle that each of the several judges in banc should state his reasons as well as his opinion. (*l*) At least it is submitted that the counsel on each side have *a right* to inquire when a jury find *generally* for the plaintiff or the defendant, which precise issue or issues they find in the affirmative or negative. In practice, when the counsel for either party thinks that a point of law may arise, rendering it important to ascertain on what precise point the jury have found their verdict, it is the practice for him to request the judge to put such questions to them; (*m*) as where the defence to an action on a bill of exchange was, that *two* alterations had been made, and the jury first found a general verdict for the defendant, Tindal C. J. in compliance with the request of the plaintiff's counsel, inquired of the jury upon which of the supposed alterations they founded their verdict, and they answered that they founded the same upon *both* the alterations. (*n*)

25. Of the Defendant compelling the plaintiff *to enter the verdict on one count.*

25. When there are several counts on the same cause of

(*i*) Per Gurney, B. in *Horner* v. *Watson*, 6 Car. & P. 680.

(*k*) Probably it has been considered that to permit the grounds or reasons for any verdict to be inquired into would in practice tend to disturb innumerable verdicts and thus be very inconvenient. The unanimity of twelve men in a verdict in civil cases *upon one and the same just reason and according to law*, is so contrary to experience in other transactions in life that it may be considered extraordinary that such unanimity should so frequently appear to occur; see Mr. Christian's note, 3 Bla. Com. 376.

(*l*) *Ante*, vol. iii. 6, 7; *Young* v. *Timmins*, 1 Tyr. 238.

(*m*) As to damages, Tidd, 869 to 896.

(*n*) *Desbrow* v. *Weatherly*, 6 Car. & P. 760, 761.

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action and only one cause of action has been proved, or where in a count on a bill of exchange, and another for the consideration thereof, and a third on the account stated, the defendant may, after the verdict has been given, but not before, (o) call on the plaintiff to elect on which count he will enter the verdict, and the plaintiff is not entitled to a verdict on all; and if the judge should rule that he is, then the defendant may and ought to tender a bill of exceptions; (p) and we have seen that the defendant is entitled to his costs upon the counts or issues found against the plaintiff. (q) In general an application to compel the plaintiff to enter the verdict on one of several counts should be made at the trial; (r) and where a verdict had been taken on all the counts by consent, with liberty to move to enter a nonsuit, the Court refused after that motion had been discharged to allow the defendant to confine the verdict to any particular count. (r)

So if the whole of an entire count for a libel with all its innuendos are not proved the jury may be required to separate their verdicts, and find, part for the plaintiff, and the residue for the defendant, and he will be entitled to the costs of the part found for him. (s)

26. Of applications to correct the verdict.

26. If a mistake in the entry of the verdict be discovered after the tral, an application to correct it must be to the judge who tried the cause, and not to *the Court in banc.* (t)

27. Other occasional incidents of a trial.

27. There are some *incidents* of trials that *occasionally arise*, and should be prepared for *pending* or immediately after *a trial*, such as where matter of defence has arisen *since the last pleading*, and heretofore called a plea *puis darrein continuance;* (u) *variances and amendments* thereof during the trial; and applications for the *judge's certificate*, so as to obtain *immediate* or early *execution*. Perhaps two of the *greatest improvements* in the administration of civil justice introduced by *modern* acts are those relating to *amendments during a trial* in cases of VARIANCE, and the allowing execution to be issued *immediately*, or very *soon* after the verdict

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(o) *Ante*, 478; *Swinburn* v. *Jones*, 1 Mood. & Rob. 322; *sed vide Woodward* v. *Cotton*, 6 Car. & Pay. 495.

(p) *Ante*, 470; *Ward* v. *Bell*, 2 Dowl. 76; 1 Crom. & M. 848; *Hull* v. *Ashurst*, *id.* 714.

(q) *Ante*, 477.

(r) *Martin* v. *Coleman*, 1 Harr. & Wol. 86.

(s) *Prudhomme* v. *Fraser*, 4 Nev. & Man. 512; 1 Harr. & Wol. 5, S. C.; 1 Chitty on Pl. [illegible].

(t) *Ante*, vol. iii. [illegible]; *Iles* v. *Turner*, 3 Dowl. 211.

(u) As to these and recent rules, see *ante*, 748, 9; 4 Car. & P. [illegible]; 1 Chitty on Pleading, Index, "Puis Darrein Continuance."

has been given, instead of compelling the plaintiff to wait for the fruits of his judgment during perhaps a long vacation.

28. The statutes 9 G. 4, c. 15, and 3 & 4 W. 4, c. 42, s. 23, enabling a judge to amend *during a trial* in cases of *variance*.

28. Before the 9 G. 4, c. 15, no judge had power to permit an amendment *pending* a trial, or at least *after the jury had been sworn*, and that act only authorized amendments by leave of the presiding judge in cases of variances between *written documents* as proved and the *record*. But the 3 & 4 W. 4, c. 42, sect. 23, 24, is much more extensive, and authorizes a judge in *every description of variance* to permit an amendment, provided the opponent, whether plaintiff or defendant, *cannot be thereby prejudiced on the trial on the merits.*(x) The act was intended to rescue the administration of justice from the aspersion, that the Courts and judges had been disposed *too readily* to listen and give effect to *technical objections.*(y) It may be hoped and anticipated, that ere long there will be an accumulation of decisions on this act, establishing that the *most liberal and extensive effect* is to be given by every judge as regards amendments of *variances*. The power of amendment seems, however, to be confined to amendments of what may be strictly termed *variances;* and *omissions* are not within the act, as if a replication or similiter be entirely *omitted;*(z) or if in an action of trover or trespass the plea does not extend to justify the taking or converting a "handkerchief," (one of the articles mentioned in the declaration,(a)) or if in debt the sum claimed or damages are not sufficiently large, the judge cannot increase the statement, as these are not *variances.*(b) If the judge on the trial *allow* an amendment, then the statute authorizes the *Court in banc* to revise his decision; *but if he refuse* leave to amend, his decision is final and conclusive, and the Court cannot interfere.(c) *Hence it is advisable in general to allow an amendment, unless the opponent will clearly be thereby prejudiced on the merits*, or at least to direct the jury to *find the facts specially, according to the evidence*, in pursuance of the 24th section of 3 & 4 W. 4, c. 42; and thus at least afford

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(x) *Hanbury* v. *Ella*, 1 Adolp. & Ell. 61.

(y) See observations of Alderson, B. in *Hemming* v. *Perry*, 6 Car. & Pa. 589, on *Jones* v. *Cowley*, 6 Dowl. & Ry. 533, as being a disgrace to the English law.

(z) *Rawlinson* v. *Roantree*, 6 Car. & Pa. 551; *Clerk* v. *Nicholas*, id. 712. In such a case in an undefended cause the *jury may be discharged*, 6 Car. & P. 217; but see *Mayor of Carmarthen* v. *Lewis*, 6 Car. & Pa. 608, as to the introduction of the word "*tolls*."

(a) *John* v. *Currie*, 6 Car. & Pa. 618.

(b) *Watkin* v. *Morgan*, 6 Car. & P. 661.

(c) *Parker* v. *Edye*, 3 Tyrw. 364; *Hanbury* v. *Ella*, 1 Adol & El. 64. The decision in *Doe* v. *Errington*, 3 Nev. & Man. 646, proceeded on a misapprehension of the judge's powers.

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the party whose pleadings have been objected to as *variant*, an opportunity of taking the opinion of the *whole Court* on the subject, rather than at nisi prius, by sometimes too hurried a decision, exclude the party from the inquiry. By the very ancient practice of the Courts on the trial of a *feigned issue*, the finding of the facts specially, and indorsing such finding on the postea, however varying from the precise terms of the pleadings and issue, was always allowed, as greatly tending to put an end to continued expensive litigation; (*d*) and no doubt the statute 3 & 4 W. 4, c. 42, s. 24, was intended to give the utmost latitude to that practice; for it will be observed, that the *pleading rules* of Hil. Term, 4 W. 4, were promulgated on the avowed ground that amendments of variances at nisi prius would be *liberally allowed;* and that *therefore* there would no longer be any necessity for several varying counts or pleas on the same cause of action or defence, previously framed, to avoid the risk of variance; and if such amendments be not *liberally allowed*, there will virtually be a breach of faith. No doubt can be entertained, that ere long a series of decisions will be established as regards the due construction of this act; and therefore it may be advisable for the present merely to give this outline. (*e*)

28 *Of Executions immediately or soon after verdict*, by leave of the judge. (*f*)

28. The next very important modern improvement in practice is, that since the enactment in 1 W. 4, c. 7, sect. 2, a judge has power to certify in any personal *action whatever*, (*g*) *that there ought to be execution immediately, or at any time he may think fit to fix*, and before the next term, to which antecedently the execution must have stood over, unless the cause had been postponed on the terms of the defendant's giving judgment of the *previous term*. The practice, however, of the judge granting a certificate for immediate or early execution, is *in general* confined to actions for *debts* due on bills of exchange, promissory notes for goods sold and work and labour, money lent, paid, or had and received, or other money claims; (*h*) though probably if it were made appear that the defendant was about to leave the country, to avoid payment of considerable *damages*

(*d*) See the numerous cases collected in Gwillim on Tithes, Index, tit. Feigned Issue.

(*e*) See the cases as to amendments of variances decided previous to March, A. D. 1835, collected in Chitty's Practice, as to amendments, &c. &c.

(*f*) See in general 1 Arch. K. B. 4 ed. 340, 376, 379, 435; 1 Arch. C. P. [103] 110, 112, 242.

(*g*) *Barrett* v. *Cox*, 1 Mood. & Rob 203. In *debt* on simple contract, the judge may certify, *Id. ibid.*, *Younge* v. *Crooks*, 1 Mood. & Rob. 220; *Fisher* v. *Davies*, 2 M. & Malk. 93; *Percival* v. *Alcock*, 1 M. & Rob. 167.

(*h*) 1 Arch. C. P. [103].

in any action whatever, immediate execution would be permitted. Where the judge considers the result as a hard case upon the defendant, as where he was fixed with liability on a bill of exchange, as executor de son tort by a small act of intermeddling, the judge on that account refused immediate execution. (*i*) Nor is it usual to grant such a certificate in a case where a material questionable point has arisen pending the trial, which may be arguable on a motion in the next term for a new trial or nonsuit, or in arrest of judgment; though even then, when the claim is large, (as 1000*l.*) the judge may require the defendant to bring into Court a considerable sum, as 500*l.*, within a fortnight. (*k*) The certificate merely expedites the execution, and does not preclude the defendant from moving for a new trial, or in arrest of judgment, or issuing a writ of error; and where a judge in pursuance of the act ordered execution within a limited time, and judgment was thereupon entered up and execution issued, it was held that the defendant was not precluded from applying in the first four days of the next term to the Court to enter a suggestion to deprive the plaintiff of costs. (*l*) It has been observed, that in practice it is advisable that an application for early execution on the part of a plaintiff should be made by his counsel *immediately* after the trial, (*m*) precisely as in special jury causes such counsel applies for a certificate that the cause was proper to be tried by a special jury. There is some contradiction as to the admissibility or utility of *affidavits* for or against the application for early execution. (*n*) When it is considered that a trial must be strictly confined to an inquiry into the formal issue or issues joined, and that no inquiry into collateral circumstances, (as whether or not an immediate execution would not be ruinous to a defendant, when, if reasonable time be allowed, he will be able to pay,) will be allowed, it would seem that on principle affidavits should be received, especially if on the part of the plaintiff it can be sworn that the defendant has declared he will leave the country, or is selling off his property apparently with that object; (*o*) or on the other hand, if it be sworn on the part of the defendant that he is at present unable to pay, but that he will be able and intends to pay by a named time, especially if it be shown that he has pro-

(*i*) Per Lord Denman, C. J. in *Seally* v. *Powis*, 1 Har. & Wol. 4.

(*k*) *Crook* v. *Jadis*, 6 Car. & P. 193.

(*l*) *Baddeley* v. *Oliver*, 1 Crom. & M. 219; 1 Dowl. 598, S. C.

(*m*) 1 Arch. C. P. [103].

(*n*) In *Gerwas* v. *Burtchley*, 2 M. & Malk. 150, Lord Lyndhurst considered an affidavit inadmissible. But Bayley, B. in *Ruddick* v. *Simmonds*, 1 M. & Rob. 184, admitted such an affidavit.

(*o*) See a form of affidavit in Ejectment, in order to obtain immediate execution, T. Chitty's Forms, 2 ed. 447.

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Conclusion.

I propose here, at least for the present, to conclude my observations on practice. It is true that there are some other proceedings *after the trial* of an action that frequently occur; but as they have been so fully and ably considered in other works, and as the recent alterations and decisions relating to them are at present but few, it is considered advisable to suspend any observations upon those subjects until there has been an accumulation of new materials, more particularly as the law of *execution*, especially against the *person*, will probably ere long undergo considerable alteration.

INDEX

TO THE WHOLE WORK.

N.B.—*In this Index all the Parts are referred to. The References after a head thus: "Index to Parts I. II. III. and IV." import that such head will be found in the Indexes to those Parts. When particular Pages and Titles are named, they refer to the Fifth and Sixth Parts, comprized in this concluding Volume.*

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